No. (1)

Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1995

ALLIGATOR FARMS, INC.,

Petitioner,

vs.

DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C.,

Respondents.

CONSOLIDATED WITH

RAYMOND JOHN O'BRIEN, III,

Petitioner,

vs.

DAVID W. GRONER,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal, Third Circuit, State of Louisiana

PETITION FOR WRIT OF CERTIORARI FOR ALLIGATOR FARMS, INC.

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Louisiana Statute of Limitations applicable to attorneys violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution?

2. Does the Louisiana Statute of Limitations applicable to attorneys violate the Due Process Clause of the United States Constitution?

LIST OF PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

1. James Buckner Doyle - Woodley, Williams, Fenet, Boudreau, Norman & Brown, Post Office Box 3731, 500 Kirby Street, Lake Charles, Louisiana 70602, (318) 433-6328, Attorneys for Paul Deballion, trustee in bankruptcy for Alligator Farms, Inc., Petitioner.

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3. William M. Bass - Voorhies & Labbe, Post Office Box 3527, 700 St. John Street, Lafayette, Louisiana 70502-3527, (318) 232-9700, Attorneys for David Groner and David Groner & Associates, a P.L.C., Respondent.

4. Leon J. Minvielle, III - Haik and Minvielle, Post Office Box 11040, 1101 East Admiral Doyle Drive, Suite 400, New Iberia, Louisiana 70562-1040, (318) 365-5486, Attorneys for Raymond John O'Brien, III, Petitioner.

Petitioner, Alligator Farms, Inc., has no parent company and has no non-wholly owned subsidiary companies.

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OPINIONS BELOW

Alligator Farms, Inc. and Raymond John O'Brien, III, filed a Petition for Damages against David Groner and David Groner & Associates, A P.L.C. on August 4, 1993. On December 8, 1993, David Groner and David Groner & Associates, A P.L.C. filed a Peremptory Exception of Prescription. The Exception came on for hearing on June 3, 1994, before Honorable Judge C. Thomas Bienvenu, Jr., Louisiana State Court Judge of the Sixteenth Judicial District Court, issued Written Reasons for Judgment on August 25, 1994, which maintained the exception of prescription filed by David Groner and David Groner & Associates, A P.L.C. Judgment was signed August 25, 1994. Raymond John O'Brien and Alligator Farms filed timely appeals.

The Louisiana Third Circuit Court of Appeal affirmed the decision of the trial court with written reasons on May 31, 1995. The Louisiana Supreme Court denied petitioner's Petition for Writ of Certiorari on October 27, 1995. The Louisiana Supreme Court further denied petitioner's Application for Reconsideration of Writ of Certiorari on November 27, 1995.

STATEMENT OF JURISDICTION

This petition seeks review of the Judgment of the Louisiana Third Circuit Court of Appeal entered on May 31, 1995. Under Louisiana procedure, that Judgment was not final until the Louisiana Supreme Court denied petitioner's Application for Writ of Certiorari or Review on October 27, 1995, and further denied the Application for Reconsideration of the Writ of Certiorari on November 27, 1995.

This petition is filed timely pursuant to 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a) in that the validity of a statute of the state of Louisiana is repugnant to the Constitution of the United States of America.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

La. Civ. Code Art. 6. Retroactivity of laws

> In the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretative laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary.

La. Civ. Code Art. 3458. Peremption; effect

> Peremption is a period of time fixed by law for the existence of a right. Unless timely exercised, the right is extinguished upon the expiration of the peremptive period.

La. Civ. Code Art. 3461. Renunciation, interruption, or suspension ineffective

> Peremption may not be renounced, interrupted, or suspended.

La. Civ. Code Art. 3492. Delictual actions

> Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained. It does not run against minors or interdicts in actions involving permanent disability and brought pursuant to the Louisiana Products Liability Act or state law governing product liability actions in effect at the time of the injury or damage.

La. Civ. Code Art. 3499. Personal action.

> Unless otherwise provided by legislation, a personal action is subject to a liberative prescription of ten years.

La. Rev. Stat. 9:5605. Actions for legal malpractice

> A. No action for damages against any attorney at law duly admitted to practice in this state, any partnership of such attorneys at law, or any professional corporation, company, organization, association, enterprise, or other commercial business or professional combination authorized by the laws of this state to engage in the practice of law, whether based upon tort, or breach of

contract, or otherwise, arising out of an engagement to provide legal services shall be brought unless filed in a court of competent jurisdiction and proper venue within one year from the date of the alleged act, omission, or neglect is discovered or should have been discovered; however, even as to actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within three years from the date of the alleged act, omission, or neglect.

B. The provisions of this Section are remedial and apply to all causes of action without regard to the date when the alleged act, omission, or neglect occurred. However, with respect to any alleged act, omission, or neglect occurring prior to September 7, 1990, actions must, in all events, be filed in a court of competent jurisdiction and proper venue on or before September 7, 1993, without regard to the date of discovery of the alleged act, omission, or neglect. The one-year and three-year periods of limitation provided in Subsection A of this Section are peremptive periods within the meaning of Civil Code Article 3458 and, in accordance with Civil Code Article 3461, may not be renounced, interrupted, or suspended.

C. Notwithstanding any other law to the contrary, in all actions brought in this state against any attorney at law duly admitted to practice in this state, any partnership of such enterprise, or other commercial business or professional combination authorized by the

> laws of this state to engage in the practice of law, the prescriptive and peremptive period shall be governed exclusively by this Section.

STATEMENT OF THE CASE

Raymond John O'Brien formed Alligator Farms, Inc. in 1989 in New Iberia, Louisiana, before becoming associated with David Groner. During the planning stages for the Alligator Farms enterprise, David Groner came to represent Raymond John O'Brien and Alligator Farms. He assisted O'Brien in preparing a financial package, or pro forma, and a business proposal for potential investors and/or for lending institutions. (Tr. p. 85). David Groner also approached O'Brien and proposed that he be given a percentage of the Alligator Farms venture in lieu of payment of attorney fees which had accrued. O'Brien agreed to this proposal, and Groner became an officer and shareholder in Alligator Farms as well as an attorney continuing his duty of obtaining financing for the company. (Tr. pp. 79, 98 and 107). Additionally, Groner, as attorney, prepared and filed various corporate documents and was listed as the company's agent for service of process. (Tr. pp. 106 and 107).

One of the documents that David Groner drafted himself was an "Incorporators and Shareholders Agreement of Alligator Farms, Inc.", which he and John O'Brien signed on November 11, 1990, whereby Groner took upon himself the following obligations:

> FOR AND IN CONSIDERATION of providing or securing adequate financing outlined as follows, DAVID W. GRONER shall be issued five hundred (500) shares of corporation stock:

> a. Payment due upon signing of the agreement: $15,000.
>
> b. Responsibility for obtaining all capital necessary to finance the operations of Alligator Farms, Inc., including meeting all operating expenses, and financing for capital improvements necessary to fully develop the operations of Alligator Farms, Inc. which are outlined in Exhibit "1", however reasonable time is allowed for the finances to be obtained.

Exhibit D-1; (Tr. pp. 53 and 54). Clearly, David Groner contractually obligated himself to "secure adequate financing" for the Alligator Farms venture, and clearly he failed in this *contractual* obligation.

In the course of time, First Production Credit Corporation agreed to loan Alligator Farms the amount of $1,500,000 which was necessary to fully fund the venture and fulfill the original business plans for the venture. (Tr. pp. 105, 106 and 125). Before the closing of the loan with First Production Credit, however, David Groner, claiming he was looking for more favorable terms upon which Alligator Farms could borrow money than those imposed by First Production Credit, contacted friends who put him in touch with representatives of Hibernia Bank in Lafayette, Louisiana. (Tr. pp. 86, 127 and 130). At a meeting between representatives of Hibernia, O'Brien and Groner, Hibernia purportedly agreed that they would fund the full $1,500,000 with terms and conditions more favorable than those offered by First Production Credit. (Tr. p. 109). Hibernia also informed Groner and O'Brien that Hibernia could commence funding in as few as

ten days. (Tr. p. 121). Hibernia had experience in the oil and gas fields in which Raymond John O'Brien owned substantial production, and their primary interest in the transaction was not the new alligator farm venture but O'Brien's substantial oil and gas holdings. (Tr. p. 130).

Defendant entered into evidence a letter dated February 4, 1991, Exhibit D-2, p. 56, from First Production Credit stating that Alligator Farm's loan application had been denied. (Tr. p. 85). However, negotiations continued after that date, as petitioners had submitted a revised loan application. (Tr. pp. 104, 105 and 125). Alligator Farms and O'Brien's negotiations with Hibernia began some time after February 1991, and after both O'Brien and David Groner believed they had a verbal commitment from First Production for a $1,000,000 loan. (Tr. pp. 105 and 125).

At this point, while Groner may have provided Alligator Farms with more favorable funding, he placed his clients in substantial jeopardy by seeking financing from Hibernia in the event Alligator Farms could not perform on its obligations. At any rate, Hibernia advanced $100,000 very soon after the initial meeting with Hibernia representatives, and while Hibernia was still investigating O'Brien's collateral (Tr. p. 108), O'Brien signed a collateral mortgage of $1,500,000 on the strength of his belief in a valid commitment, an action he would not have taken without that belief. (Tr. pp. 102, 112 and 113); Exhibits P-1 and P-2. He also would not have signed a collateral mortgage of $1,500,000 for a loan of $400,000.

Immediately after the original funding, Groner and O'Brien began to contract with vendors and suppliers overseas, and in the interim Hibernia advanced another $250,000 to the venture. (Tr. p. 107). At the time of this second advance Hibernia still had not completed the in-house evaluation of O'Brien's properties, nor had a title opinion been completed. (Tr. p. 108). Shortly

thereafter, however, Hibernia informed Groner and O'Brien that they no longer performed in-house oil and gas evaluations on properties and that funding would be suspended until the bank could obtain an independent evaluation of O'Brien's oil and gas properties. (Tr.pp. 102 and 119); Exhibit D-3, pp. 57, 58. In response to this development, John Madison, one of O'Brien's oil and gas business attorneys, at O'Brien's request, sent a letter to the bank requesting that Hibernia continue funding the alligator project; Exhibit D-3, pp. 57, 58. Harold Turner of Hibernia responded by saying they had no written or verbal agreement to loan $1,500,000, and also stated: "As long as there is a misunderstanding concerning this commitment issue, *I will not be able to continue working with your clients.*" (Emphasis added) (Exhibit D-4, p. 60). However, after the date this letter was sent, Hibernia advanced a further $50,000. (Tr. p. 108). In all, Hibernia advanced $400,000 to Alligator Farms and John O'Brien before his oil and gas interests had been evaluated and a title opinion had been completed. (Tr. p. 108).

Then, sometime thereafter, Hibernia became reluctant to advance more funds. (Tr. p. 108). Efforts to negotiate further funding stalled. Alligator Farms was unable to meet the enormous obligations it had incurred based on the promise of $1,500,000 to be forthcoming from Hibernia. Unable to meet their obligations, O'Brien filed a Chapter 11 bankruptcy, and Alligator Farms filed a Chapter 7. (Tr. p. 109). Meanwhile, David Groner was still representing to Alligator Farms and O'Brien that there was a written loan commitment from Hibernia and/or documentation of the commitment, and that the bank would have to loan the remainder of the $1,500,000. As a result, Alligator Farms and O'Brien listed a potential cause of action against Hibernia for failure to perform as an asset in their bankruptcies. (Tr. p. 109).

On the strength of David Groner's representations, and

relying on his expertise as an attorney for Alligator Farms and John O'Brien, O'Brien argued in the bankruptcy court that he should be discharged as surety on the debt of Alligator Farms to Hibernia because Hibernia had breached an agreement to lend Alligator Farms $1,500,000. (Tr. p. 109). Additionally, the parties engaged in negotiations with Hibernia which addressed the commitment. (Tr. p. 109). This argument was ultimately unsuccessful, however, since no *written agreement* or documentation of the commitment between Alligator Farms and O'Brien and Hibernia was found, as required by LSA-R.S. 6:1121 *et seq.*

During the course of O'Brien's bankruptcy action involving Hibernia, in the latter part of August 1992, discovery revealed that there was indeed no written commitment from Hibernia to make the loan for $1,500,000 nor any document which could arguably be considered such a commitment. (Tr. pp. 110 and 114). David Groner had, however, at all times represented to the petitioners that such a written loan commitment did exist, and that this commitment did obligate Hibernia to lend the entire amount requested by the petitioners. It was not until November of 1992 that O'Brien and Alligator Farms learned that there was no basis in law for a cause of action against Hibernia Bank, pursuant to a court ruling. (Tr. pp. 111 and 112).

In the latter part of August of 1992, O'Brien and Alligator Farms saw for the first time documents produced by Hibernia concerning the loan. (Tr. pp. 114 and 115). There was no commitment letter in those documents. In November of 1992, Alligator Farms and O'Brien appeared before the bankruptcy court on the matter of the Hibernia Bank obligation. When they could not produce a written commitment from the bank pursuant to La. Rev. Stat. 6:1121 *et seq.*, the Bankruptcy Judge refused to consider any other evidence in the matter. (Tr. pp. 111, 112 and 115). In February 1993, O'Brien suffered the consequences of

Groner's failure to obtain the written commitment by repaying the $400,000 plus interest to Hibernia. (Tr. p. 112).

Therefore, the suit filed by petitioners against respondents on August 3, 1993, was timely as filed within one year of the discovery that a cause of action existed against David Groner and David Groner & Associates, A P.L.C. and that petitioners actually sustained damages.

The allegation that Louisiana's statute concerning a prescriptive and peremptive period for legal malpractice was unconstitutional was first raised during the Application for Writ of Certiorari to the Louisiana Supreme Court filed on behalf of Alligator Farms, Inc., to review the ruling of the Louisiana Court of Appeal, Third Circuit, said writ being filed on July 3, 1995. The constitutionality of this particular provision was raised in Assignment of Error Number 2 and was discussed at length in the body of the applicant's writ application. (*See* Appendix , 23a-27a). The Louisiana Supreme Court denied the writ application filed by Alligator Farms, Inc., on October 27, 1995.

REASONS FOR GRANTING THE WRIT

I.

THE RULING OF THE LOUISIANA THIRD CIRCUIT COURT OF APPEAL IS UNCONSTITUTIONAL AS APPLIED BECAUSE IT CREATES ARBITRARY CLASSIFICATIONS AND DISCRIMINATES AGAINST VICTIMS OF LEGAL MALPRACTICE AND BECAUSE IT DIVESTS THE PETITIONERS OF VESTED RIGHTS.

The Louisiana Legislature has created an unconstitutional situation within the state of Louisiana which creates separate

classes of tort feasors and unlawfully discriminates between the victims of tort feasor activity. The Legislature has seen fit to grant a much greater degree of protection and immunity to an insular minority of attorney tort feasors and has created an unduly harsh burden upon the victims of their malpractice, all of which is repugnant to the Constitution of this United States.

Amendment XIV, Section 1 of the United States Constitution provides as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It is the argument of the applicants herein that the statute created by the Louisiana Legislature has created classifications within its jurisdiction which violate both the Equal Protection and Due Process Clause sof this Amendment.

Applicants assert that respondent, David Groner, breached his fiduciary duty (committed legal malpractice) in the following instances:

A. Failure to get a written loan commitment from Hibernia Bank for the $1,500,000 needed; and

B. Placing his clients' assets in jeopardy with Hibernia

when another company, First Production Credit Corporation, was ready to loan all $1,500,000 with less security than Hibernia wanted.

Petitioners also assert that their claims against respondents have not prescribed, as ruled by the Louisiana Third Circuit Court of Appeal. This is not simply an issue of when petitioners discovered the malpractice, but is also one of when petitioners sustained damages. It is further an example of how the Louisiana Legislature has treated lawyer tort feasors much more favorably than layman tort feasors, all in violation of the United States Constitution.

The class distinctions are drawn and created by La. R.S. 9:5605 and La. Civ. Code Art. 3492. La. R.S. 9:5605 provides as follows:

> A. No action for damages against any attorney at law . . . shall be brought . . . unless filed . . . within one year from the date that the alleged act, omission, or neglect was discovered; however, even as to actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within three years from the date of the alleged act, omission or neglect.
>
> B. The provisions of this Section are remedial and apply to all causes of action without regard to the date when the alleged act, omission, or neglect occurred. However, with respect to any alleged act, omission, or neglect occurring prior to September 7, 1990, actions must, in all events, be filed in a court of competent jurisdiction and proper venue

> on or before September 7, 1993, without regard to the date of discovery of the alleged act, omission, or neglect. The one-year and three-year periods of limitation provided in Subsection A of this Section are peremptive periods within the meaning of Civil Code Article 3458 and, in accordance with Civil Code Article 3461, may not be renounced, interrupted, or suspended.
>
> C. Notwithstanding any other law to the contrary, in all actions brought in this state against any attorney at law duly admitted to practice in this state, any partnership of such enterprise, or other commercial business or professional combination authorized by the laws of this state to engage in the practice of law, the prescriptive and peremptive period shall be governed exclusively by this Section.

In contrast, La. Civ. Code Art. 3492 creates a separate prescriptive period for layman tort feasors as follows:

> Delictual actions are subject to liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained. It does not run against minors or interdicts in actions involving permanent disability and brought pursuant to the Louisiana Products Liability Act or state law governing product liability actions in effect at the time of the injury or damage.

As can be seen, an action against a layman tort feasor lies only after injury or damage has been sustained, and not necessarily the date of the act or omission.

The statute at issue here, La. R.S. 9:5605, was created by the Louisiana Legislature and was adopted by a discreet and insular minority of the population, *i.e.*, attorneys, who make up the vast majority of the legislature. The political impotence of the vast population of the state of Louisiana coupled with the beneficial nature of the statute to the Legislators themselves, created a "we-they" generalization which can only be likened to racial classifications. In the typical racial classifications that disadvantage minorities, Legislatures have traditionally not only not been black; they have been white. A decision to distinguish blacks from whites therefore has its roots in a comparison between a "we" stereotype and a "they" stereotype. Eli, *Democracy and Distrust,* 145-57 (1980). Likewise, the Louisiana legislation giving preferential treatment to attorney tort feasors and not to other general tort feasors, creates a "we-they" stereotype which must be reviewed with the strictest scrutiny and one which cannot be sustained in this matter.

As set forth in paragraph 26 of the petition for damages filed herein, O'Brien and Alligator Farms alleged that they discovered the act, omission or neglect — namely, Groner's malpractice — at the earliest in August of 1992 and actually sustained damages because of this malpractice thereafter. Within *one year* afterward, namely August 3, 1993, Alligator Farms filed its Petition for Damages. Regarding the peremption issue, the petition alleges that Groner's actions occurred in 1991 and 1992, but were not discovered until at least August, 1992. The suit was filed in August, 1993, well within the *three-year* peremption provision of R.S. 9:5605.

Furthermore, the doctrine of *contra non valentem non currit praescriptio* means that prescription does not run against a person who could not bring his suit, and is a judicial exception to prescription. The Louisiana Supreme Court in *Lima v. Schmidt*, 595 So. 2d 624 (La. 1992) stated:

> Prescriptive statutes are strictly construed against prescription and in favor of the obligation sought to be extinguished; thus, of two possible constructions, that which favors maintaining, as opposed to barring, an action should be adopted. . . . To soften the occasional harshness of prescriptive statutes, our courts have recognized a jurisprudential exception to prescription: *contra non valentem non currit praescriptio* which means that prescription does not run against a person who could not bring his suit.

Id. at 629. Citations omitted.

Up until August, 1992, when the petitioners learned with certainty that there was no written loan commitment by Hibernia, David Groner had assured petitioners that there was a written loan commitment or a similar document. The letter of July 11, 1991, Trial Exhibit D-4, from Hibernia stated the bank had no written commitment to loan the money. The bank nevertheless did advance more cash following this letter, which also stated that they would *not* be doing any more business with Alligator Farms until the matter of there being no commitment was cleared up. There is nothing in the hearing testimony or documentary evidence entered to show that petitioners ever acknowledged the bank's letter or expressed an understanding of its contents, as Hibernia had demanded.

In other words, the July 11, 1991, letter did not end the negotiations between the bank and the petitioners. Hibernia continued to investigate O'Brien's oil and gas holdings, and more money was advanced, as well as there being further discussions regarding the loan. This was the error the Trial Judge made. He thought the July 11, 1991, letter made the bank's

position perfectly clear once and for all, and that the petitioners willfully ignored the finality of the bank's position.

This is simply not the case. After the exchange of letters, O'Brien and Alligator Farms relied upon their attorney's continuing representations that the company did have a valid commitment from Hibernia, and they trusted their attorney to protect their interests in that matter. Their trust was well founded as Hibernia continued to provide funding *after* the correspondence referenced above. Alligator Farms correctly relied upon its attorney's representations that the bank was performing pursuant to its commitment.

This trust was obviously misplaced, however, since there is no evidence in the record that David Groner responded to this letter, as he should have, by seeking to obtain a written commitment from the bank. At that time, the relationship between Groner and Alligator Farms was ongoing as attorney and client, and Groner was still an officer and shareholder in the corporation.

In the case of *Braud v. New England Ins. Co.*, 576 So. 2d 466 (La. 1991), the Louisiana Supreme Court recognized that prescription would be suspended "during the attorney's continuous representation of the client regarding the specific subject matter in which the alleged wrongful act or omission occurred".

The *Lima v. Schmidt* case, *supra*, quoted jurisprudence from other states to describe the suspension of prescription for the so-called continuous representation rule:

> The continuous representation rule appropriately protects the integrity of the attorney-client relationship and affords the

> attorney an opportunity to remedy his error (or to establish that there has been no error), while simultaneously preventing the attorney from defeating the client's cause of action through delay. *Wall v. Louis*, 393 N.W.2d 758, 763 (N.D. 1986). The rationale behind this rule is that '"[a] plaintiff cannot justly be held to be 'sleeping on his rights' when he is relying upon a honored fiduciary relationship (sic)."

Id. at 630.

In order for the continuous representation rule to apply, the attorney must have an ongoing relationship with the client after the alleged malpractice for the performance of the same or related services, and the relationship is not merely a continuity of a general professional relationship. *See Lima*, *supra*, at 630. *Lima* also stated that "termination is not synonymous with the change of counsel. . . ."

In the case at bar, David Groner continued to represent petitioners well after the July 11, 1991, letter from Hibernia expressing the fact that they had made no written commitment to loan the $1,500,000. He also continuously warranted to petitioners that Hibernia would be forced to lend the entire amount or to pay damages because it had a written loan commitment.

In the past, an action for legal malpractice was delictual and governed by the one-year prescription of Louisiana Civil Code Article 3492. *See Lima v. Schmidt*, *supra*, at 628, and the cases cited therein. The rule is subject to two exceptions: (1) when the attorney expressly warrants a specific result and fails to obtain that result, and (2) when the attorney agrees to perform certain

work and does nothing whatsoever. "In these two contexts, the action is in contract and subject to the ten-year prescriptive period provided by LSA-C.C. art. 3499." *Lima, supra*, 628, at note.

Even if this Court finds that petitioners' claims against Groner have prescribed under the provisions of La. R.S. 9:5605, it is clear that these claims have not prescribed under La. Civ. Code art. 3499.

Petitioners obviously did not sustain damages at the time of the July 11, 1991, letter from Hibernia Bank. At that time, David Groner could still have negotiated a loan such as Alligator Farms needed and could have obtained a valid, written commitment from the bank by whatever means would have been required. He did not do so then or later, and eventually he abandoned the venture altogether. Apparently, at that point, Groner thought he was done with his obligations to the corporation, but he had overlooked the matter of the "Incorporators and Stockholders Agreement of Alligator Farms, Inc." — which he had drafted — which obligated him to secure financing for Alligator Farms. Since the prescription period for breach of a contract is a personal action with a prescriptive period of ten years, this provides a further reason in law why this action has not prescribed.

On the basis of their belief that Hibernia was committed to loaning the venture more money up to the amount of $1,500,000, petitioners brought Hibernia into the bankruptcy action, a cause of action against Hibernia was listed as an asset in the bankruptcy proceedings, and the suit progressed to the discovery stage. *At the same time*, though, negotiations for the loan with Hibernia were ongoing. Learning through discovery that Hibernia had made no written commitment, petitioners could not maintain a statutory action to force Hibernia to honor its commitment to loan them

$1,500,000. It was at that time that Alligator Farms sustained damages.

In *Simpkins v. Means*, 612 So. 2d 160 (La. App. 1st Cir. 1992), the plaintiff invoked the jurisprudential doctrine of *contra non valentem* and contended that prescription was suspended because he was unaware that he had a cause of action against his union, and, therefore, he was also unaware of a potential malpractice claim against the defendants until he was so advised by his present counsel in October, 1987. *Contra non valentem*, the court said, would only aid Simpkins if his ignorance of the cause of action was excusable, since the doctrine applies only where the cause of action is not known or reasonably knowable by the plaintiff. The trial court found that Simpkins knew the facts necessary to state a cause of action because he was well-versed, from past experience in several other lawsuits, in the availability of legal redress for wrongful actions and had a working knowledge of Louisiana prescription periods. In the case at bar, Mr. O'Brien did not have extensive litigation experience and relied upon the legal advice of David Groner concerning the loan commitment from Hibernia Bank.

By the same token, petitioners could not sue David Groner until they knew they had a cause of action against him, *after* finding no written loan commitment did exist; the rest of the $1,500,000 would not be forthcoming; and they could not compel Hibernia to honor their commitment. This was proof of Groner's failure to protect his client's interests and secure a viable commitment.

As explained in the case of *Rayne State Bank & Trust v. National Union Fire Ins.*, 483 So. 2d 987 (La. 1986):

> In Louisiana, prescription does not begin to run until damage is sustained. The tort prescription provisions in former C.C. 3537

> were reenacted without substantive change in 1984 as C.C. 3492. C.C. 3537 provided that the one-year prescriptive period for delictual actions runs "from [the day] on which the injurious words, disturbance, or damage were sustained." Mere notice of a wrongful act will not suffice to commence the running of the prescriptive period. The reason is clear. In order for the prescriptive period to commence, the plaintiff must be able to state a cause of action — both a wrongful act and resultant damages. Because the damage must necessarily occur after the wrongful act, prescription runs from that point and not from the date of the wrongful act. . . . Thus, until damage was '"sustained" by the bank, it had no cause of action, and prescription did not commence to run on the date the bank received notice of possibly fatal defects in the mortgages (995).

The decision in *Rayne State Bank* is generally relevant here. The bank filed a legal malpractice suit against attorneys and their law firms and the legal malpractice insurer for both firms, alleging it was damaged as a result of two allegedly fatally defective mortgages. One attorney had drafted the mortgages while the other reviewed them. Neither found the fatal defect. The mortgages were drawn to secure loans to corporate clients of the attorney who drafted the mortgages. After the corporations began to default on their loans, and having been informed that the corporations would possibly end up in bankruptcy, the bank consulted an attorney who specialized in advising banks in the event of borrower bankruptcies. The second attorney was hired strictly to render an opinion on the documents, which he did in a meeting with a bank representative. The attorney later stated that

he had explained the defects contained in the mortgages, while the bank representative stated that only some minor defects were pointed out.

The mortgages had been prepared in January of 1979. The bank representative and the attorney who reviewed the mortgages met in March of 1980. In November of 1980, the corporation representatives contacted the bank to say the mortgages were defective, and they threatened to file for bankruptcy and to seek invalidation of the mortgages in bankruptcy court unless the bank loaned them an additional $150,000, which the bank refused to do. The bank initiated foreclosure proceedings on the mortgages in January of 1981. The corporations filed for bankruptcy on January 20, 1981, and they filed adversary proceedings against the bank on January 27, 1981, to invalidate the mortgages insofar as they related to movable property. The bank filed third party complaints in bankruptcy court on April 28, 1981.

After settlement negotiations, during which the defendant law firms urged the bank to accept the debtor's offer of settlement, the matter was settled in October of 1981. The corporate debtors stipulated to the validity of the mortgages, and the stipulation was incorporated into the judgment of the bankruptcy court. Thus, a determination on the merits was precluded, and it was not decided one way or another whether the mortgages were invalid because of the defects. The bank filed suit in bankruptcy court against the law firms and their insurer, and that suit was pending when a subsequent civil suit was filed on March 24, 1982.

The Supreme Court, in deciding *Rayne State Bank*, stated that the bank had not sustained damages by virtue of the mere existence of defects in the mortgages. The possibility of damage from the existence of the defects was merely speculative and

uncertain and contingent on the possibility of an attack on the validity of the mortgages by a third party. There was also the possibility the debtors would declare bankruptcy. Had neither of these contingencies occurred, the bank would not have sustained any harm.

Following the decision in *Rayne State Bank*, the Louisiana Third Circuit in *Malone v. Wright*, 525 So. 2d 13 (La. App. 3 Cir. 1988), explained:

> The [Supreme] Court reasoned that regardless of the actual validity or invalidity of the mortgage, damage was sustained *because* the bank was forced to defend the attack. In other words, damage occurred when the rights of the bank were attacked in the adversary proceedings.

Id. at 15. Emphasis in text.

In the instant matter, if David Groner had fulfilled his fiduciary and contractual duties, especially after the July, 1991, letters, petitioners would not have sustained damages.

The Louisiana Court of Appeal has ruled that prescription begins to run on a legal malpractice claim from the date that a client receives the slightest notice that the attorney may have erred. The court has specifically ruled that even if no injury has been sustained, prescription begins to run nonetheless. The effect of this ruling is that while a plaintiff may not have a cause of action (as a cause of action is defined as a wrongful act and resulting injury), they would nonetheless be required to file a lawsuit to prevent the running of the statute of limitations. Clearly, the suit would be dismissed for lack of a valid cause of action and unless an injury would occur within a year, a client

would lose any and all rights to compensation by virtue of the application of the Third Circuit's interpretation of the prescriptive statute. This court in addressing similar arguments, has held them to be "intolerable." *See Taylor v. Giddens*, 618 So.2d 834 (La. 1993).

Previous rulings of the Louisiana Supreme Court made it very clear, even under the new attorney malpractice prescriptive statute, that an injury was required to commence the running of the applicable prescriptive period. The Louisiana Legislature, in response to these interpretations, amended the statute to declare it remedial in an attempt to retroactively apply a new interpretation of the statute to pending cases. This court has specifically stated that in certain cases, despite the Legislature's intent to retroactively apply a statute or amendment, it may not do so if it divests a plaintiff of a vested right or causes a constitutional violation. The effect of depriving a plaintiff of a vested right, as did the Louisiana Third Circuit, is unconstitutional.

The ruling of the trial court, as affirmed by the Louisiana Court of Appeal, would require any client to file suit against his attorney at the first hint of any problems in litigation. This ruling is contrary to well established principles of notice and discovery.

"As a general proposition, [it] is undeniably true [that] it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification." But "it must appear" that a classification is "based upon some reasonable ground — some difference which bears a just and proper relation to the attempted classification — and is not a mere arbitrary selection." *Gulf, C. & S. F. Ry. v. Ellis*, 165 U.S. 150 (1897). The classification created by the Louisiana Legislature, *i.e.*, attorney tort feasors versus layman tort feasors, has no reasonable basis in law. The legislation sets out to insulate attorneys from wrong doing and

unfairly discriminates against those clients who have placed their trust in the hands of an attorney, which trust is subsequently violated. The legislation encourages attorneys to cover up any wrong doings for a mere three year period whereafter they cannot be held liable for their actions under any scenario. A layman tort feasor who covers up his actions for a period of three years will still be subject to a tort lawsuit upon discovery by the victim of the wrong doing. Such base classifications are a violation per se of the Equal Protection Clause of the United States Constitution.

The "traditional approach" standard of judicial review grants a state "the broad discretion and classification in the exercise of its power of regulation" and interpose the "constitutional guarantee of equal protection" only "against discriminations that are entirely arbitrary." *Smith v. Cahoon*, 283 U.S. 553 (1931). In *Royster Guano Company v. Virginia*, 253 U.S. 412 (1920), the Court suggests a more active judicial role: "The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." The object of the Louisiana Legislature in creating these classifications is to treat their own, *i.e.*, attorneys, separately from normal, layman tort feasors. There is no compelling or justifiable reason to give an attorney greater protection from the laws than the average citizen enjoys. Such a classification smacks of croonyism and can not be tolerated in our federal government.

In its decision, the Third Circuit stated that under La. R.S. 9:5605, prescription runs from the date of the act or omission, not from the time of the injury, and cited *Succession of Hellmers*, 637 So. 2d 1302 (La. App. 4th Cir. 1994). In *Hellmers*, the court stated that Section 5605 was "amended to make clear that prescription runs from the *act or omission*, not from the injuries'." 637 So. 2d at 1306 (emphasis in original).

It makes little sense that prescription on a cause of action can begin to run before the potential plaintiff has even sustained any damages. However, assuming the Louisiana Third and Fourth Circuits' interpretation of the 1992 amendments is correct, and the addition of paragraph (b) to Section 5605 eliminated the requirement that the legal malpractice plaintiff have sustained damages before a cause of action accrues, that interpretation is unconstitutional and unduly harsh as it applies to Alligator Farms. The result of this interpretation and application of Section 5605 is that the 1992 amendments eliminated Alligator Farms' cause of action against Groner before that cause of action accrued.

The Louisiana Third Circuit, in this case, the Louisiana First Circuit in *Vaughn v. Slaughter*, 553 So. 2d 36 (La. App. 1st Cir. 1995), and the Louisiana Fourth Circuit in *Succession of Hellmers*, 637 So. 2d 1302 (La. App. 4th Cir. 1994), have all held that the purpose of the 1992 amendments to Section 5605 was to eliminate the requirement that a malpractice plaintiff sustain damage before a cause of action accrues for legal malpractice. If this interpretation is correct, the 1992 amendments simultaneously created a vested right in Alligator Farms and eliminated that right through the operation of the one-year prescriptive period. However, as interpreted and applied herein, the 1992 amendments to La. R.S. 9:5605 is unconstitutional as it violates the Federal Due Process clause and constitutes a taking of personal property without due process of law.

The Louisiana Supreme Court has on numerous occasions observed that the principal contained in La. Civ. Code art. 6 regarding interpretation of the retroactivity of legislative enactments, has constitutional implications under the due process and contract clauses of both the United States and Louisiana Constitutions. *Segura v. Frank*, 630 So. 2d 714, 721 (La. 1994); *Cole v. Celotex Corp.*, 599 So. 2d 1058, 1063 (La.

1992); *St. Paul Fire and Marine Ins. Co. v. Smith*, 609 So. 2d 809, 816 n. 11 (La. 1992); *Board of Commissioners v. Department of Natural Resources*, 496 So. 2d 281, 291 (La. 1986); *Conn v. Conn*, 468 So. 2d 1176, 1181 (La. 1985); *See also*, citations in *Segura*, 630 So. 2d at 721. Thus, even where the Legislature has expressed its intent to give a substantive law retroactive effect, the law may not be applied retroactively if it would impair a contractual obligation or disturb vested rights.

As the Louisiana Supreme Court stated in *Cole*, 599 So. 2d at 1064-64:

> [S]tatutes enacted after the acquisition of such a vested property right cannot be retroactively applied so as to divest a plaintiff of his vested right in his cause of action because such a retroactive application would contravene the due process guarantees.

599 So. 2d at 1063-64, citing *Faucheux v. Alton Oschner Medical Foundation Hospital and Clinic*, 470 So. 2d 878, 879 (La. 1985).

Accepting the Louisiana Third Circuit's interpretation of the relevant statute as correct, then the effect of the amendment would have been to create a new right in Alligator Farms, that being the right to sue prior to sustaining any injuries. Simultaneously, this statute would have deprived Alligator Farms of that very right by virtue of the application of the prescriptive statute.

The Louisiana Supreme Court reviewed an analogous situation in *Taylor v. Giddens*, 618 So. 2d 834 (La. 1993). In *Taylor*, the argument advanced by the defense would have resulted in wrongful death claimants losing their cause of action before it accrued. In responding to that argument, The court stated that:

> Their [victim's] remedy to address their civil wrong would have been eliminated prior to the accrual of their cause of action. Such a result is intolerable as it discriminates among wrongful death tort claimants.

Likewise, the result of this case is intolerable as it discriminates among legal malpractice tort claimants. "The requirement that laws be equal rests upon a theory of legislation quite distinct from that of pressure groups — a theory which puts forward some conception of a 'general good' as the 'legitimate public purpose' at which legislation must aim, and according to which the triumph of private or group pressure marks the corruption of a legislative process." Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 350 (1949). As this quote from the California Law Review points out, there must be a legitimate public purpose for the classification at issue. The legislation must be exempt from an appearance of impropriety imposed by a pressure group which would indicate the corruption of the legislative process. In this instance, we have the Louisiana Legislature made up mainly of attorneys, creating a classification which directly benefits them, to the detriment of the general good. The only persons benefiting from such a law are the Legislators themselves, and the select, hand picked professions to which they belong.

"[A] vast part of the output of the governmental process would be seen to consist of discrimination in the sense of an effort to redistribute wealth (in one form or another) from one group in the community to another, founded on the superior ability of one group to manipulate the political process rather than on any principal of justice or efficiency." Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 S. Ct. Rev. 1, 27. The Louisiana Legislature is a prime example of a single groups' ability to manipulate the

political process for their own benefit and the benefit of their colleagues as opposed to basing legislation on any principal of justice or efficiency. There is no rational basis for the creation of a completely separate classification to protect attorneys, especially when the legislation condones the attorney's concealment of any wrong doing for a three year period of time. La. R.S. 9:5605 must be stricken as repulsive to the constitutional guarantee of equal protection of the laws and the guarantee of due process as given by the United States Constitution.

CONCLUSION

In the instant litigation, petitioners sustained a great deal of damage, which, they discovered, had been the result of attorney malpractice. Petitioners relied on their attorney to do all that was necessary to secure a bank loan. Their attorney actively concealed the fact that he did not, and could not, obtain such a loan.

Petitioners filed their action against respondents herein within one year of learning their attorney had breached his fiduciary duty, this action was timely and should not have been dismissed.

To the extent that the courts below retroactively applied their interpretation of the statute to divest the petitioners of a vested right or to treat them differently from victims of other tort feasors, their decision violates the Due Process Clause of the United Constitution.

If La. R.S. 9:5605 was interpreted correctly by the courts below and the effect of the statute is to deprive a victim of recovery for a wrong committed upon them by another, the statute violates both the Louisiana and United States Constitutions.

The Louisiana Legislature has seen fit to attempt to insulate themselves from liability by placing a peremptive period on any action which can be brought against an attorney. This peremptive period has absolutely no basis in the law and creates insular classifications which deserve the strictest scrutiny from this Honorable Court. Furthermore, statutes such as the one at issue here, which treat attorney tort feasors much more favorably than layman tort feasors, do absolutely nothing to further the image of attorneys nor do they promote public confidence in the legislative process. Rather, the exact opposite effect occurs.

After review, petitioners herein respectfully request this Honorable Court to strike down the attorney malpractice prescriptive period and return all tort feasors to a status quo, that being that a tort victim has one year from the date injury or damage is sustained, with no peremptive period.

Respectfully submitted,

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APPENDIX A — DENIAL OF RECONSIDERATION OF WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT DATED NOVEMBER 27, 1995

THE SUPREME COURT OF THE STATE OF LOUISIANA

NO. 95-C-1670

RAYMOND JOHN O'BRIEN, III

VERSUS

DAVID W. GRONER

C/W
ALLIGATOR FARMS, INC. ET AL

VERSUS

DAVID GRONER, ET AL

IN RE: Alligator Farms Inc.; Plaintiff(s); Applying for Reconsideration of this Court's action dated October 27, 1995; Parish of Iberia, 16th Judicial District Court, Div. "A" Number 0781443; to the Court of Appeal, Third Circuit, Number CA94-1611, CA94-1612

November 27, 1995

Reconsideration denied. Judgment is res judicata.

CDK
PFC
WFM
JCW
HTL
BJJ
JPV

Appendix A

Supreme Court of Louisiana
November 27, 1995

s/ illegible
Clerk of Court
For the Court

APPENDIX B — DENIAL OF WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT DATED OCTOBER 27, 1995

THE SUPREME COURT OF THE STATE OF LOUISIANA

NO. 95-C-1670

RAYMOND JOHN O'BRIEN, III

VERSUS

DAVID W. GRONER

C/W
ALLIGATOR FARMS, INC. ET AL

VS.

DAVID GRONER, ET AL

IN RE: Alligator Farms Inc.; Plaintiff(s); Applying for Writ of Certiorari and/or Review; Parish of Iberia 16th Judicial District Court Div. "A" Number 078081, 078143; to the Court of Appeal, Third Circuit, Number CA94-1611, CA94-1612

October 27, 1995

Denied.

BJJ
PFC
WFM
JCW

LEMMON, J. would grant the writ.
KIMBALL, J. would grant the writ.
VICTORY, J. would grant the writ.

Appendix B

Supreme Court of Louisiana
October 27, 1995

s/ illegible
Clerk of Court
For the Court

APPENDIX C — DECISION OF THE LOUISIANA THIRD CIRCUIT COURT OF APPEAL DATED MAY 31, 1995

NOT FOR PUBLICATION

NUMBER 94-1611

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

RAYMOND JOHN O'BRIEN, III

Plaintiff-Appellant

VERSUS

DAVID W. GRONER

Defendant-Appellee

CONSOLIDATED WITH NUMBER 94-1612

ALLIGATOR FARMS, INC., ET AL

Plaintiffs-Appellants

VERSUS

DAVID GRONER, ET AL

Defendants-Appellees

On Appeal from the Sixteenth Judicial District for the Parish of Iberia, State of Louisiana; Honorable C. Thomas Bienvenu, Jr., Judge, Presiding.

Appendix C

BEFORE: LABORDE, WOODARD and AMY, Judges.

LABORDE, Judge.

Plaintiffs filed suit against defendant for legal malpractice. Defendant then filed an exception of prescription, which the trial court granted, dismissing plaintiffs' action. Plaintiffs appeal. We affirm, finding no error in the trial court's judgment.

FACTS

Plaintiff, Raymond John O'Brien, was the owner of Alligator Farms, Inc., a corporation he formed in 1989. Defendant, David Groner, an attorney was hired by the corporation to assist in preparing a financial package and business proposal for potential investors and lending institutions. Groner agreed to accept a percentage of the company's profits instead of monetary payment for his services. In the agreement in which Groner became a shareholder, dated November 11, 1990, the parties listed Groner's responsibilities as follows:

> Responsibility for obtaining all capital necessary to finance the operations of Alligator Farms, Inc., including meeting all operating expenses, and financing for capital improvements necessary to fully develop the operations of Alligator Farms, Inc. which are outlined in Exhibit "1", however reasonable time is allowed for the finances to be obtained.

Groner was then named as an officer and shareholder of the corporation, and he continued to represent the corporation for the purpose of obtaining financing. Groner approached First Production Credit Corporation for financing $1.5 million to Alligator Farms. However, during negotiations with First Production, Groner contacted Hibernia Bank in Lafayette to see if he could get more favorable loan terms for the company. Hibernia apparently agreed to loan Alligator Farms the same amount, with more favorable terms than First Production, and informed Alligator Farms that it could make the funds available immediately. After Alligator Farms began negotiations with Hibernia, it informed First Production that it was no longer interested in obtaining a loan.

Hibernia began evaluating plaintiffs loan application, with O'Brien's assets as collateral. Hibernia advanced $100,000 to Alligator Farms while it was still investigating Alligator Farms' collateral. O'Brien then signed a collateral mortgage on his personal property to Hibernia for $1.5 million, to secure the financing from Hibernia. Hibernia subsequently advanced another $250,000, even though it had not completed a title opinion to O'Brien's oil and gas properties. Soon afterwards, Hibernia informed Alligator Farms that funding would be suspended until the bank could obtain an independent evaluation of the properties.

O'Brien then asked one of his oil and gas attorneys, John Madison, to write a letter to Hibernia in support of his loan. On July 5, 1991, Madison wrote a letter to Hibernia outlining O'Brien's understanding of the status of the loan. By letter dated July 11, 1991 , Harold Turner of Hibernia responded that Hibernia had not made a verbal or written commitment to O'Brien or Alligator Farms for any amount. He further stated

that Hibernia had advanced funds to the company based only on O'Brien's personal income and would not be advancing additional funds until completion of the evaluation of his oil and gas properties. A copy of this letter was also sent to O'Brien. However, after this letter was sent, Hibernia did advance Alligator Farms another $50,000, for a total of $400,000.

The appraisal concluded that O'Brien's properties were insufficient to support the loan. Hibernia subsequently refused to advance Alligator Farms any more funds. Because of this failure of Hibernia to loan the money Alligator Farms believed was promised, Alligator Farms was unable to meet its other commitments. Both O'Brien and Alligator Farms were forced to file for bankruptcy protection.

In August 1991, during bankruptcy proceedings, plaintiffs discovered that there was no written commitment from Hibernia to make a loan for $1.5 million. Yet Groner had represented to plaintiffs that a written loan commitment did exist, obligating Hibernia to loan the entire $1.5 million. In November of 1992, the bankruptcy judge concluded that plaintiffs had no cause of action against Hibernia because they had no written loan commitment. Plaintiffs claim they did not know there was no legal basis for a cause of action against Hibernia until the bankruptcy judge dismissed their claim.

Suit was filed by Raymond John O'Brien against David Groner on July 21, 1993. Another suit was filed against Groner on August 3, 1993, by the trustee in bankruptcy for Alligator Farms. Defendant subsequently filed a peremptory exception of prescription on December 8, 1993. Hearing on the exception was held on June 3, 1994. At that time, the trial

judge granted defendant's motion to consolidate the two cases. The trial court granted defendant's exception of prescription, dismissing plaintiffs claims against Groner. Plaintiff O'Brien appeals, alleging three assignments of error:

> 1. The trial judge erred in finding that Raymond John O'Brien, III had notice which caused prescription to run against his cause of action more than one year before filing his Petition for Damages.
>
> 2. The trial judge erred in finding that Raymond John O'Brien, III has sustained damages more than one year before filing his Petition for Damages.
>
> 3. The trial judge erred in dismissing the petition of Raymond John O'Brien, III in its entirety, as Raymond John O'Brien III alleged several causes of action, i.e., failure of Groner to obtain a written commitment from the lender, failure to obtain an independent evaluation of O'Brien's oil and gas properties, and representing both the corporation and O'Brien individually, to the detriment of O'Brien.

Alligator Farms also appeals, alleging two assignments of error:

> 1. The trial judge erred in finding that Alligator Farms, Inc. had notice which caused prescription to run against its cause

of action more than one year before filing its Petition for Damages.

2. The trial judge erred in finding that Alligator Farms, Inc. had sustained damages more than one year before filing its Petition for Damages.

Prescription

The trial court found that plaintiffs action had prescribed. In his reasons for judgment, the trial court stated as follows:

> The statute that is controlling for purposes of these exceptions is Section 5605 of Title 9 of the Revised Statutes. And for our purposes here, we are talking about a cause of action for legal malpractice and an exception of prescription to that cause of action based on the one-year prescriptive period provided by Paragraph "A" of the section that I just mentioned. And regardless of the doctrine of contra non valentem, the statute is clear that there is a one-year prescriptive period, either requiring that the suit be brought within one year from the date of the alleged act or within one year from the date that the alleged act is discovered or should have been discóvered by the plaintiffs.
>
> The alleged act, as I — as I understand, regardless of whether — of when the

damages may have been actually sustained, was the act of Mr. Groner in not obtaining a written commitment for a $1.2 million loan that he had secured; in other words, that he had received a commitment for that amount but had not taken the appropriate legal step to get it in writing, which he should have prudently done as an attorney. That's the cause of action, I understand, against him. That's the — the act complained of. And the question is: when should that act or omission have been discovered by the plaintiffs?

Well, it seems to me that, regardless of what may have happened before, the Hibernia National Bank, in response — by letter of July 5th, 1991, in response to Mr. Madison's letter to them of July — I'm sorry — their letter of July 11th, 1991, which is Defendant's Exhibit Number 4, in response to Mr. Madison's letter to the bank of July 5th, 1991, Defendant's Exhibit Number 3, makes it clear that it's the bank's position that they did not at that time and up to that time make either a verbal or written commitment to the plaintiffs for any amount. Now, Defendant's Exhibit Number 4 was copied to Mr. O'Brien, and there seems to be no question but that the plaintiffs were aware of this letter.

I don't see any evidence of anything

happening after that that should have caused the plaintiffs to reasonably believe that the bank had made a commitment to them, a firm commitment to them for — for any amount, except what they later loaned, $50,000.00, and certainly not in the amount of $1.2 million. If the bank made no commitment, either verbally or in writing, it should not have come as a surprise in August of '92 to find that out upon examination of the bank's documents; and it should not have been a surprise in November of 1992 when the bankruptcy judge announced that he could not give any more credence to the plaintiff's claim against Hibernia because there was not in existence a written letter of commitment. I don't see what could have happened between July 5th, 1991 — July 11th, 1991 and November of 1992 to make the plaintiffs reasonably believe that the desired commitment was there, either verbally or in writing. I don't doubt that Mr. O'Brien believed it, but it becomes a question under the statute of reasonableness. Should he have believed it? I think then that sufficient time elapsed for the filing of the action, which is one year from the date of the act or when the plaintiffs should have discovered the act. It would seem to me that the exceptions of prescription should be sustained.

Appendix C

We agree with the trial court's conclusions. Under La. R.S. 9:5605, prescription runs from the time of the act or omission, not from the time of the injury. Succession of Hellmers, 93-2386, 93-2387, 93-1883, 93-2073 (La.App. 4 Cir. 5/26/94); 637 So.2d 1302. Thus, the trial court properly sustained the defendant's exception of prescription.

DECREE

The judgment of the trial court is affirmed. Costs assessed to plaintiffs-appellants, Raymond John O'Brien and Alligator Farms, Inc.

AFFIRMED.

APPENDIX D — JUDGMENT AND WRITTEN REASONS FOR JUDGMENT FROM THE SIXTEENTH JUDICIAL DISTRICT COURT, STATE OF LOUISIANA

16th JUDICIAL DISTRICT COURT

DOCKET NUMBER: 78081-A

IBERIA PARISH, LOUISIANA

RAYMOND JOHN O'BRIEN

VERSUS

DAVID W. GRONER

CONSOLIDATED WITH

16TH JUDICIAL DISTRICT COURT

DOCKET NUMBER: 78143-A

IBERIA PARISH, LOUISIANA

ALLIGATOR FARMS, INC. and RAYMOND JOHN O'BRIEN, III

VERSUS

DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C.

Appendix D

JUDGMENT

This matter came for hearing before this Honorable Court on June 3, 1994 on an Exception of Prescription filed by defendants, DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C.;

Present at the hearing were:

1) Leon J. Minvielle, III, counsel for RAYMOND JOHN O'BRIEN;

2) Milo A. Nickel, Jr., counsel for ALLIGATOR FARMS, INC. and RAYMOND JOHN O'BRIEN, III; and

3) William M. Bass, counsel for DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C.

After considering the law, evidence, memorandum and arguments of counsel, together with the pleadings, testimony, and depositions, it is the Court's Judgment that:

The Exception of Prescription filed on behalf of DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C. is hereby sustained with Judgment rendered in favor of DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C. and against plaintiffs, RAYMOND JOHN O'BRIEN, III and ALLIGATOR FARMS, INC., with the costs of this matter to be shared by plaintiffs, RAYMOND JOHN O'BRIEN, III and ALLIGATOR FARMS, INC.

IT IS ORDERED, ADJUDGED AND DECREED that there be Judgment herein in favor of DAVID GRONER and

Appendix D

DAVID GRONER & ASSOCIATES, A P.L.C., and against RAYMOND JOHN O'BRIEN, III and ALLIGATOR FARMS, INC., dismissing plaintiffs' demands against DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C., with prejudice at plaintiffs' costs.

JUDGMENT RENDERED, READ AND SIGNED on this 25th day of August, 1994 at New Iberia, Louisiana.

s/ C. Thomas Bienvienu, Jr.
HONORABLE C. THOMAS BIENVIENU, JR.
16th Judicial District Judge

Appendix D

[73] REASONS FOR RULING

BY THE COURT:

Okay. The statute that is controlling for purposes of these exceptions is Section 5605 of Title 9 of the Revised Statutes. And for our purposes here, we are talking about a cause of action for legal malpractice and an exception of prescription to that cause of action based on the one-year prescriptive period provided by Paragraph "A" of the section that I just mentioned. And regardless of the doctrine of contra non valentem, the statute is clear that there is a one-year prescriptive period, either requiring that the suit be brought within one year from the date of the alleged act or within one year from the date that the alleged act is discovered or should have been discovered by the plaintiffs.

The alleged act, as I — as I understand, regardless of whether — of when the damages may have been actually sustained, was the act of Mr. Groner in not obtaining a written commitment for a $1.2 million loan that he had secured; in other words, that he had received a commitment for that amount but had not taken the appropriate legal step to get it in writing, which he should have prudently done as an attorney. That's the cause of action, I understand, against him. That's the — the act complained of. And the question is: when should that act or omission have been discovered by the plaintiffs?

[74] Well, it seems to me that, regardless of what may have happened before, the Hibernia National Bank, in response — by letter of July 5th, 1991, in response to Mr. Madison's letter to them of July — I'm sorry — their letter of July 11th, 1991, which is Defendant's Exhibit Number 4, in

response to Mr. Madison's letter to the bank of July 5th, 1991, Defendant's Exhibit Number 3, makes it clear that it's the bank's position that they did not at that time and up to that time make either a verbal or written commitment to the plaintiffs for any amount. Now, Defendant's Exhibit Number 4 was copied to Mr. O'Brien, and there seems to be no question but that the plaintiffs were aware of this letter.

I don't see any evidence of anything happening after that that should have caused the plaintiffs to reasonably believe that the bank had made a commitment to them, a firm commitment to them for — for any amount, except what they later loaned, $50,000.00, and certainly not in the amount of $1.2 million. If the bank made no commitment, either verbally or in writing, it should not have come as a surprise in August of '92 to find that out upon examination of the bank's documents; and it should not have been a surprise in November of 1992 when the bankruptcy judge announced that he could not give any more credence to the plaintiff's claim against Hibernia because there was not in existence a written letter of commitment. I don't see what could have happened between July 5th, 1991 — July 11th, 1991 [75] and November of 1992 to make the plaintiffs reasonably believe that the desired commitment was there, either verbally or in writing. I don't doubt that Mr. O'Brien believed it, but it becomes a question under the statute of reasonableness. Should he have believed it? I think then that sufficient time elapsed for the filing of the action, which is one year from the date of the act or when the plaintiffs should have discovered the act. It would seem to me that the exceptions of prescription should be sustained.

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BY MR. NICKEL:

May I add one point for the record, your Honor?

BY THE COURT:

Yes, sir.

BY MR. NICKEL:

For the record, the cases that are cited by both Mr. Minvielle and myself in the briefs state that a plaintiff cannot maintain a cause of action and in fact a cause of action is premature until an ascertainable damage has been suffered with certainty.

Now, our position in this case is that Mr. O'Brien's damage was the loss of his cause of action against Hibernia, which occurred in November when the court did rule.

We — there's no dispute that Hibernia wrote a letter that said, "It's our position there's no commitment." There's also no dispute as between the parties that both sides believed that prior to that letter they had a written commitment. And [76] had they had one, they would have had a valid cause of action against Mr. O'Brien.

Mr. O'Brien could not have sued — had no reason — neither party had a reason to sue Hibernia after those letters were written, because, as Mr. O'Brien has testified, they did fund additional money after those letters; there was no damage.

Appendix D

The issue becomes: when can he file suit? Even with discovery, even with the act, a cause of action does not exist without damages. The position of all parties in this case — of both plaintiffs is: there was no damage until Mr. O'Brien lost his cause of action against Hibernia Bank. And that occurred in November of 1992.

BY THE COURT:

Well, I don't know. I can let Mr. Bass respond if he wants. You want?

BY MR. BASS:

Your Honor, those comments by counsel were not appropriate. I think the Act is very clear with respect to what the prescriptive period is. And I think it's sufficient, and I think we've met that — met those requirements.

BY MR. NICKEL:

I'm not trying to mislead the Court or counsel about what the Act states, Your Honor. We cited cases that said that a cause of action does not accrue until there is an ascertainable damage that has been caused with sufficient certainty by a given source. And our position is that, before the parties could sue Mr. Groner or before the [77] cause of action even came into existence, there had to be damages which were suffered with certainty as a result of Mr. Groner's conduct. And that's — we believe the evidence here indicates that that damage occurred when there was an adverse ruling within the bankruptcy proceedings.

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BY THE COURT:

Well, I don't think that's so. That's — that's simply when the bankruptcy judge made his ruling. But, to me, it should have been obvious beforehand that the basis for the ruling was there. And I don't think that's when the damages were sustained. That may have been when they became formalized or it became crystal clear or — or it was the date apparently of the dismissal of the action that the plaintiffs had against Hibernia. But I don't — I don't arrive at that same conclusion. But, to the extent that — that you need to protect the record, it's on the record.

Now, you know, appellate courts are very liberal on the question. So it may be y'all may succeed in taking it up. And certainly don't have any hesitation to, if you want to. You're not going to make me feel bad. If they feel differently, that's fine. The claim's not against me.

At any rate, if there's — one of y'all prepare a judgment. I guess — you've got two lawsuits here. Well, they're consolidated.

[78] BY MR. MINVIELLE:

They're consolidated now.

BY THE COURT:

So I guess you'll want to prepare it.

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BY MR. BASS:

Yes, sir.

BY THE COURT:

Send it to counsel for approval as to form, or at least give them an opportunity to object to the form.

BY MR. BASS:

Thank you, Your Honor.

APPENDIX E — EXCERPTS OF BRIEF TO THE SUPREME COURT OF LOUISIANA

IN THE

SUPREME COURT

STATE OF LOUISIANA

DOCKET NO. 95 C 160

RAYMOND JOHN O'BRIEN, III, Appellant

Versus

DAVID W. GRONER, Appellee

-CONSOLIDATED WITH-

ALLIGATOR FARMS, INC., Appellant

Versus

DAVID GRONER AND DAVID GRONER & ASSOCIATES, A P.L.C., Appellee

APPLICATION FOR WRIT OF CERTIORARI FILED ON BEHALF OF ALLIGATOR FARMS, INC. TO REVIEW THE RULING OF THE COURT OF APPEAL, THIRD CIRCUIT

CIVIL CASE

Respectfully Submitted,

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Appendix E

* * *

2. ***The Third Circuit's ruling is unconstitutional as applied because it discriminates against victims of legal malpractice and because it divests the plaintiffs of vested rights.***

In its decision, the Third Circuit stated that under La. R.S. 9:5605, prescription runs from the date of the act or omission, not from the time of the injury, and cited *Succession of Hellmers*, 637 So.2d 1302 (La. App. 4 Cir. 1994). In *Hellmers*, the court stated that Section 5605 was amended to make clear that prescription runs from the *act or omission*, not from the injuries'." 637 So.2d at 1306 (emphasis in original).

It makes little sense that prescription on a cause of action can begin to run before the potential plaintiff has even sustained any damages. However, assuming the Third and Fourth Circuits' interpretation of the 1992 amendments is correct, and the addition of paragraph (b) to Section 5605 eliminated the requirement that the legal malpractice plaintiff have sustained damages before a cause of action accrues, that interpretation is unconstitutional and unduly harsh as it applies to Alligator Farms. The result of this interpretation and application of Section 5605 is that the 1992 amendments eliminated Alligator Farms cause of action against Groner before that cause of action accrued.

The Third Circuit, in this case, the First Circuit in *Vaughn v. Slaughter*, 553 So.2d 36 (La. App. 1 Cir. 1995), and the Fourth Circuit in *Succession of Hellmers*, 637 So.2d 1302 (La. App. 4 Cir. 1994), have all held that the purpose of the 1992

amendments to Section 5605 was to eliminate the requirement that a malpractice plaintiff sustain damage before a cause of action accrues for legal malpractice. If this interpretation is correct, the 1992 amendments simultaneously vested right in Alligator Farms and eliminated that right through the operation of the one-year prescriptive period. However, as interpreted and applied herein, the 1992 amendments to La. R.S. 9:5605 is unconstitutional.

The Louisiana Supreme Court has on numerous occasions observed that the principal contained in Civil Code art. 6 regarding interpretation of the retroactivity of legislative enactments, has constitutional implications under the due process and contract clauses of both the United States and Louisiana Constitutions. *Segura v. Frank*, 630 So.2d 714, 721 (La. 1994); *Cole v. Celotex Corp.*, 599 So.2d 1058, 1063 (La. 1992); *St. Paul Fire and Marine Ins. Co. v. Smith*, 609 So.2d 809, 816 n.11 (La. 1992); *Board of Commissioners v. Department of Natural Resources*, 496 So.2d 281, 291 (La. 1986); *Conn v. Conn*, 468 So.2d 1176, 1181 (La. 1985); *See also*, citations in *Segura*, 630 So.2d at 721. Thus, even where the Legislature has expressed its intent to give a substantive law retroactive effect, the law may not be applied retroactively if it would impair a contractual obligation or disturb vested rights. *Id.*

As This Court stated in *Cole*, 599 So.2d at 1064-64:

> "[S]tatutes enacted after the acquisition of such a vested property right' cannot be retroactively applied so as to divest a plaintiff of his vested right in his cause of action because such a retroactive

> application would contravene the due process guarantees." 599 So.2d at 1063-64, citing *Faucheux v. Alton Oschner Medical Foundation Hospital and Clinic*, 470 So.2d 878, 879 (La. 1985).

Accepting the Third Circuit's interpretation of the relevant statute as correct, then the effect of the amendment would have been to create a new right in Alligator Farms, that being the right to sue prior to sustaining any injuries. Simultaneously, this statute would have deprived Alligator Farms of that very right by virtue of the application of the prescriptive statute.

This Court reviewed an analogous situation in *Taylor v. Giddens*, 618 So.2d 834 (La. 1993). In *Taylor*, the argument advanced by the defense would have resulted in wrongful death claimants losing their cause of action before it accrued. In responding to that argument, This Court stated that:

> "Their remedy to address their civil wrong would have been eliminated prior to the accrual of their cause of action. Such a result is intolerable as it discriminates among wrongful death tort claimants."

CONCLUSION

The trial court and Court of Appeal wrongly decided that prescription began to run in this case when the clients received a letter which was later contradicted by their counsel and by the actions of the letter's author. Under any interpretation of the discovery rule, prescription did not begin to run until the

plaintiffs possessed sufficient facts to put them on notice that they may have a cause of action. Those facts were adduced by the plaintiffs within a year of the commencement of the instant action.

To the extent that the courts below retroactively applied their interpretation of the statute to divest the plaintiffs of a vested right or to treat them differently from victims of other tort feasors, their decision violates state and federal Constitutions.

If the statute was interpreted correctly by the courts below and the effect of the statute is to deprive a victim of recovery for a wrong committed upon them by another, the statute violates state and federal Constitutions as well.

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No. 95-1218

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1995

ALLIGATOR FARMS, INC.,

Petitioner,

vs.

DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C.,

Respondents.

-CONSOLIDATED WITH-

RAYMOND JOHN O'BRIEN, III,

Petitioner,

vs.

DAVID W. GRONER,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Third Circuit State Of Louisiana

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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RESPONDENT'S STATEMENT OF THE CASE

In 1990, Raymond John O'Brien, III, who owned Alligator Farms, Inc., became interested in expanding the ongoing operations of the business. (Tr. page 79) As part of the expansion, in November, 1990, David W. Groner acquired shares in the Alligator Farms, Inc. venture. (Tr. page 79, and Exhibit D-1 located at Tr. page 53). Alligator Farms, Inc. was in need of additional capital, therefore, in exchange for Mr. Groner's shares of stocks, he agreed to secure financing for the venture as well as paying $15,000 out front for the stock. (Tr. page 84; Exhibit D-1; Tr. pages 53-54).

Mr. Groner thereafter filed a loan application with First South Production Credit Association. (Tr. pages 80, 85.) On February 4, 1991, Cecil Corbello, of First South Production Credit Association sent a letter to the corporate address of Alligator Farms, Inc. in which he indicated that the application for financing was denied. (Exhibit D-2 at Tr. page 56.) Mr. Groner then entered into discussions with Hibernia National Bank regarding obtaining financing for the expansion of Alligator Farms, Inc. (Tr. page 86). After entering into discussions with Hibernia, Alligator Farms, Inc. informed First Production Credit Association that it was no longer interested in obtaining a loan from its institution. (Tr. pages 101, 120). Alligator Farms, through the testimony of Raymond O'Brien, contends that Mr. Groner and Mr. O'Brien believed that they had a verbal commitment from First South Production Credit Association for a $1,000,000 loan. (Tr. pages 105, 125) Admittedly, however, Alligator Farms and Raymond O'Brien agree that there was no written agreement with First South Production Credit

Association and that it was not a viable source of the loan. (Pet. page 7, par. 2; Tr. page 120).

In the meantime, Hibernia National Bank had indicated that it was willing to make the loan if the evaluation of O'Brien's assets met their criteria for collateral. (Tr. pages 130, 131.) Towards that end, Hibernia National Bank hired an appraisal company, D.O.R., to evaluate O'Brien's oil and gas properties. (Tr. page 119.) Pending the appraisal, funds in the amount of $400,000.00 were advanced to O'Brien and Alligator Farms, Inc., based on O'Brien's ability to repay that money out of his personal income. (Tr. page 108, Exhibit D-4 at Tr. page 59).

On July 5, 1991, John M. Madison, Jr., O'Brien's oil and gas attorney, sent a letter to Hibernia National Bank outlining O'Brien's understanding of the status of the loan. (Exhibit D-3 at Tr. page 57). Specifically, the understanding was that Hibernia National Bank had agreed to loan Alligator Farms $1.5 million. Madison further stated in his letter that it was understood that the bank's commitment was conditioned on receipt of satisfactory title examination of O'Brien's interest in Lake Arthur mineral rights. Madison explained that O'Brien had received approximately $350,000.00 at that time, but the remainder of the loan had not been funded. Madison further related that upon O'Brien's inquiry to the bank, he had been told that the reports evaluating the mineral interests had been discontinued. Consequently, because of this, O'Brien was extremely concerned about the situation because it could prove "calamitous" and "disastrous" to Alligator Farms, Inc. (Exhibit D-3 at Tr. pages 57, 58).

In response thereto, on July 11, 1991, Hibernia National Bank sent a letter to Mr. Madison, and copied O'Brien, specifically stating, "we do not have nor have ever made either a verbal or written commitment to John O'Brien or his company, Alligator Farms, Inc. for any amount – certainly not $1.5 million." (Tr. page 59, Exhibit D-4). Hibernia's letter further stated that on three different occasions monies had been advanced on the strength of O'Brien's personal income, pending an evaluation completed on his oil and gas interests. (Tr. page 59, Exhibit D-4).

When the appraisal of the oil and gas interests came in, it was insufficient to support the loan. (Tr. pages 102, 103). This report was rendered long before the institution of the bankruptcy proceedings, and put Mr. O'Brien on notice that Hibernia was not going to loan the money based on this appraisal. (Tr. page 103).

On or around November, 1991, David W. Groner resigned his position as a Board of Directors member and officer of the corporation, Alligator Farms, Inc. (Tr. page 124).

Some time thereafter, Alligator Farms, Inc. and Raymond John O'Brien, III, personally, filed for bankruptcy protection. (Tr. page 109). The bankruptcy filing listed a claim against Hibernia National Bank for breach of a lending contract. (Tr. page 109). On or around November, 1992, the judge in the bankruptcy proceedings dismissed the claims against Hibernia due to lack of a written loan commitment. (Tr. pages 110, 111).

On July 21, 1993, Raymond John O'Brien, III and Alligator Farms, Inc. both filed petitions for damages

against David W. Groner alleging the existence of an attorney/client relationship between David W. Groner and Raymond John O'Brien, III and Alligator Farms, Inc. (Tr. pages 2-12). Specifically, they allege that the fiduciary duty was breached by Mr. Groner's failure to obtain the total funding contemplated resulting in the destruction of the corporation and its bankruptcy. (Tr. page 9, Plaintiffs-Appellants' Petition, paragraph 22).

Thereafter, David W. Groner filed an Answer and a Peremptory Exception for Prescription. For the purposes of the hearing on the Exception of Prescription and for this appeal, *only*, it was admitted that an attorney/client relationship existed between Raymond John O'Brien, III and Alligator Farms, Inc. and David W. Groner. (Tr. page 82).

ARGUMENT

Respondents oppose the Petition for Writ of Certiorari on two grounds: (1) the petitioner's failure to properly present either of the federal questions in the state courts deprives this court of jurisdiction; and (2) the lower courts' interpretation of L.A.-R.S. 9:5605 does not raise either due process or equal protection constitutional concerns.

I. Petitioner's failure to properly present either of the federal questions in the state courts deprives this court of jurisdiction.

This court's certiorari jurisdiction over decisions from state courts derives from 28 USC § 1257 which provides:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the Untied States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

In *Yee v. City of Escondido, Cal.*, 112 S.Ct. 1522 (1992), this court held that where constitutional claims had not been addressed on the merits in the state courts, those claims would not be considered on a writ of certiorari. The facts of that case are set forth below.

John and Irene Yee owned the Friendly Hills and Sunset Mobile Home Parks, both of which are located in the city of Escondido. They filed suit, contending that a local rent control ordinance, when viewed against the backdrop of California's Mobile-home Residency Law, amounted to a physical occupation of their property entitling them to compensation. The Yees requested damages of six million dollars, a declaration that the rent control

ordinance was unconstitutional, and an injunction barring the ordinance's enforcement. *Id.* at pg. 1527. The Superior Court sustained the city's demurrer and dismissed the Yees' complaint.

The Court of Appeal affirmed, in an opinion primarily devoted to expressing the court's disagreement with the reasoning of *Hall v. City of Santa Barbara*, 833 F.2d 1270 (CA9 1987), cert. denied, 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988), which had held that a similar mobile home rent control ordinance effected a physical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

The California Supreme Court denied review. This court granted certiorari to resolve the conflict between the decision below and those of two of the federal Courts of Appeals.

In the Supreme Court, petitioners attempted to challenge the ordinance on two additional grounds, one of which was that the statute amounted to a denial of substantive due process and a regulatory taking. The court found that claim was not properly before it, because it was not properly raised or addressed below, stating as follows:

> "[11] The Yees did not include a due process claim in their complaint. Nor did petitioner raise a due process claim in the Court of Appeal. It was not until their petition for review in the California Supreme Court that petitioners finally raised a substantive due process claim. But the California Supreme Court denied discretionary review. Such a denial, as in this Court, expresses no view as to the merits. See *People v.*

Triggs, 8 Cal.3d 884, 890-891, 106 Cal.Rptr. 408, 412, 506 P.2d 232, 236 (1973). In short, petitioners did not raise a substantive due process claim in the state courts, and no state court has addressed such a claim.

In reviewing the judgments of state courts under the jurisdictional grant of 28 U.S.C. § 1257, the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below. *Illinois v. Gates*, 462 U.S. 213, 218-220, 103 S.Ct. 2317, 2321-2323, 76 L.Ed.2d 527 (1983). While we have expressed inconsistent views as to whether this rule is jurisdictional or prudential in cases arising from state courts, see *ibid.*, we need not resolve the question here. (In cases arising from federal courts, the rule is prudential only. See, e.g., *Carlson v. Green*, 446 U.S. 14, 17, n. 2,100 S.Ct. 1468, 1470, n. 2, 64 L.Ed.2d 15 (1980).) Even if the rule were prudential, we would adhere to it in this case. Because petitioners did not raise their substantive due process claim below, and because the state courts did not address it, we will not consider it here. *Id.* at pg. 1531.

The procedural posture of the petitioner's constitutional issues in this case is the same as those in *Yee*, supra. That is, petitioner did not raise its constitutional claims either in its original petition for damages or at any time during the trial of this matter. There is no reference whatsoever, to a constitutional challenge in the trial court's reasons for ruling. (App. D). Nor were any errors based on constitutional challenges assigned in petitioner's appeal. (App. C). For the first time, in its original application for a writ of certiorari to the Louisiana

Supreme Court, petitioner challenged the constitutionality of the prescriptive statutes at issue in this case. The writ was denied without written reasons therefore. (App. B). Petitioner's application for reconsideration of those issues was also denied without written reasons therefore. (App. A).

As this court noted in *Yee*, supra, a denial of a writ, without reasons, expresses no opinion as to the merits of the constitutional issues. Since neither the trial court, the appellate court nor the Louisiana Supreme Court has considered the constitutionality of L.A.-R.S. 9:5605, this court should decline to consider the issue on a writ of certiorari. As there are no issues which are properly before this court for review, it is respectfully submitted that jurisdiction is lacking and the Petition for Writ of Certiorari should be denied.

II. The lower courts' interpretation of L.A.-R.S. 9:5605 does not raise either due process or equal protection constitutional concerns.

Rule 10 of the Supreme Court Rules provides that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Examples, which are not controlling, are given, indicating the character of reasons that will be considered. The section pertinent to this case provides that a writ may be considered:

> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be,

> settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Petitioner contends that L.A.-R.S. 9:5605 violates the Equal Protection and Due Process Clauses of the United States Constitution. (Pet. pg. i).

A. Equal Protection

With respect to equal protection, petitioner argues that "the Louisiana Legislature has treated lawyer tortfeasors much more favorably than laymen tortfeasors". (Pet. pg. 12). Specifically, petitioner suggests that the attorney tortfeasor receives more favorable treatment than the layman tortfeasor because prescription on a cause of action against the former begins to run from the date of the act or omission, whereas prescription on a cause of action against the latter does not begin to run until injury or damage is sustained. (Pet. pgs. 12-14). Moreover, petitioner complains that the "legislation encourages attorneys to cover up any wrongdoings for a mere three year period wherafter they cannot be held liable for their actions under any scenario. A layman tortfeasor who covers up his actions for a period of three years will still be subject to a tort lawsuit upon discovery by the victim of the wrongdoing. Such base classifications are a violation per se of the Equal Protection Clause of the United States Constitution." (Pet. pg. 24).

The Louisiana Statute which is applicable to attorneys is L.A.-R.S. 9:5605 which provides as follows:

> (A) No action for damages against any attorney at law . . . shall be brought . . . unless

> filed . . . within one year from the date that the alleged act, omission, or neglect was discovered; however, even as to actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within there years from the date of the alleged act, omissions, or neglect.
>
> (B) The provisions of this section are remedial and apply to all causes of action without regard to the date when the alleged act, omission, or neglect occurred. However, with respect to any alleged act, omission, or neglect occurring prior to September 7, 1990, actions must, in all events, be filed in a court of competent jurisdiction and proper venue on or before September 7, 1993, without regard to the date of discovery of the alleged act, omission, or neglect. The one year and three year periods of limitation provided in subsection a of this section are preemptive periods within the meaning of Civil Code Article 3458 and, in accordance with Civil Code Article 3461, may not be renounced, interrupted, or suspended.

The general prescriptive period for torts in Louisiana is found in La.-C.C.Art. 3492 which provides that:

> Delictual actions are subject to liberative prescription of one year. This prescription commences to run from the day the injury or damage is sustained. It does not run against minors or interdicts in actions involving permanent disability and brought pursuant to the Louisiana Products Liability Act or state law governing product liability actions in effect at the time of the injury or damage.

A showing that different persons are treated differently is not enough, without more, to show a denial of equal protection. *Griffin v. County School Bd. of Prince Edward County*, 84 S.Ct. 1226, 377 U.S. 218, 12 L.Ed.2d 256 (1964), motion granted, 84 S.Ct. 1627, 377 U.S. 950, 12 L.Ed.2d. 496.

L.A.-R.S. 9:5605 does not discriminate between victims of attorney malpractice. Equal Protection of the laws is not denied by a statute if all persons subject to it are treated alike under similar circumstances. *Currin v. Wallace*, 59 S.Ct. 379, 306 U.S. 1, 83 L.Ed. 441 (1939); *Reynolds v. Sims*, 84 S.Ct. 1362, 377 U.S. 533, 12 L.Ed.2d 506, *rehearing denied*, 85 S.Ct. 12, 13, 379 U.S. 870, 871, 13 L.Ed.2d. 76, 77 (1964). Therefore, the statute is not discriminatory on its face. Nor, since petitioner claims to be a victim of attorney malpractice, is the statute discriminatory in application. However, petitioner suggests that there is different treatment of victims of lay tortfeasors and victims of attorney malpractice, amounting to discrimination in violation of the Equal Protection Clause.

Respondent suggests that despite the difference in the language of the two statutes herein at issue, as Louisiana courts have interpreted these statutes, the Equal Protection Clause is not implicated. L.A.-R.S. 9:5605 provides that prescription commences to run at the date on which the act is discovered. La. Civ. Code art 3492 provides that prescription commences to run when injury or damage is sustained. However, in both instances, the court is really concerned with the date on which the plaintiff's discovery of his cause of action occurs. For instance, in most personal injury cases, the act and the damage generally occur simultaneously and as such, prescription beings to

run immediately. See e.g., *Christian v. Daniel Manufacturing Co.*, 279 So.2d 214 (La. App. 1993) (Action for damage for personal injuries sustained by plaintiff in a fall from a ladder provided by defendants for whom plaintiff was working began to run on date of fall); *Additon v. Chevron U.S.A., Inc.*, 526 So.2d 465 (La. App. 1st Cir. 1988), writ denied 532 So.2d 177, reconsideration denied 533 So.2d 7) (Prescription of personal injury action was not tolled until such time as plaintiff realized severity of back injury where plaintiff experienced pain and knew he had hurt his back immediately upon injuring it). Often, however, the damage may be the first notice that a plaintiff has of his cause of action. In these instances, courts deem actions timely filed if instituted within one year of the date of the discovery of damage and the cause thereof. See e.g., *Touchstone v. Land & Marine Applicators, Inc.*, 628 F. Supp. 1202 (E.D.La. 1986) (Louisiana one year prescription period governing claims against manufacturers and distributors of safety mask used by sandblasters and sand suppliers to recover for silicosis accrued when the symptoms were manifested, not necessarily when the disease was diagnosed); *Woessner v. Johns-Manville Sales Corp.*, 576 F.Supp. 596, affirmed, 757 F.2d, 634 (Where plaintiff knew as early as 1972 that he had been exposed to asbestos-containing products and that he had been diagnosed as having asbestosis, prescription on his cause of action against asbestos manufacturer commenced at that time, and thus, action which was instituted in 1982 was time barred under Louisiana law). In either case, the court looks to a common denominator, i.e. the date of discovery, to determine when prescription on a cause of action begins to run.

Likewise, prescription on an action against an attorney for malpractice begins to run from the date of discovery of the cause of action. In this respect, there is no different treatment, or discrimination, between victims of personal injury accidents and victims of legal malpractice.[1]

---

[1] Petitioner acknowledges that the date of discovery is the key issue in this case. (Pet. pg. 14, par. 2). Only petitioner argues that it did not discover the malpractice until August of 1992. (Pet. pg 14-15). It argues that the action against Respondent was filed within one year of "learning their attorney had breached his fiduciary duty." (Pet. pg. 28). Notably, however, petitioner's whole argument is that the trial court's factual findings were in error:

> [T]he July 11, 1991 letter did not end the negotiations between the bank and the petitioners. . . . This was the error the Trial judge made. He thought the July 11, 1991 letter made the bank's position perfectly clear once and for all. . . . (Pet. pg. 15-16).

These are not the facts. The court found that:

> [R]egardless of what may have happened before, the Hibernia National Bank, in . . . their letter of July 11th, 1991, which is Defendant's Exhibit Number 4 . . . makes it clear that it's the bank's position that they did not at that time and up to that time make either a verbal or written commitment to the plaintiffs for any amount. Now, Defendant's Exhibit Number 4 was copied to Mr. O'Brien, and there seems to be no question but that the plaintiffs were aware of this letter. (App. D, pg. 13a).

The appellate court affirmed these factual findings. (App. C, pgs. 9a-10a). Since review of a state court's factual findings is not appropriate on a writ of certiorari, petitioner has put forth "smoking mirrors", asserting non-existent constitutional issues.

Ironically, if there is a difference in treatment, the difference operates in *favor* of the victim of attorney malpractice, in which class the petitioner claims to be. The Louisiana legislature has granted victims of malpractice the right to proceed with suit upon discovery of the attorney's negligent act, whereas victims of lay tortfeasors must wait until damage is manifested with some degree of certainty. As such, petitioner has no standing to complain of an equal protection violation.

Petitioner also suggests that the application of a three year preemptive period to victims of attorney malpractice, but not to victims of lay tortfeasors, is a violation of equal protection. However, this portion of the statute has never been raised or in any way at issue in this case, and as such, the constitutionality of that portion of the statute, being separable, is not an issue before the court.

In any event, L.A.-R.S. 9:5605 passes constitutional muster. A legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated or perceived by the courts. *U.S. v. Maryland Savings-Share Ins. Corp.* (1970), 91 S.Ct. 16, 400 U.S. 4, 27 L.Ed.2d 4. State laws are entitled to a presumption of validity against attack under the Equal Protection Clause. *Parham v. Hughes*, 99 S.Ct. 1742, 441 U.S. 347, 60 L.Ed. 269 (1979). Petitioner fairly admits that attorneys are not in a suspect class and that, therefore, a State may make classifications, i.e., attorney tortfeasors versus layman tortfeasors, so long as there is some reasonable basis in the law for doing so. (Pet., pg. 23).

This court has indicated that the primary purpose of statutes of limitations is to assure fairness to defendants.

Burnett v. New York Central Railroad Company, 380 U.S. 424, 428 (1965). Statutes of limitations:

> "[P]romote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."

Id. (quoting *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944)). "Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights." *Burnett*, 380 U.S. at 428.

Louisiana's concept of liberative prescription is parallel to a statute of limitations. Like statutes of limitations, liberative prescription is a procedural bar to legal actions not timely instituted. La. Civ. Code art. 3492. Its roots are in considerations of social stability and procedural fairness. "[Liberative prescription] is socially useful in that it puts an end to litigation and terminates the uncertainty of the debtor." Comment, Revision of the Civil Code Provisions on Liberative Prescription, 60 Tul. L. Rev. 379, 380 (1985) (hereinafter "Comment"). "Commentators and courts agree that the potential injustice of liberative prescription – nonpayment of a debt justly owed – is outweighed by the greater evil of interminable liability." Id. Further:

> "In terms of social utility, prescription can be compared with the rules of res judicata. Their function is analogous. There comes a moment when it is necessary to say the last word, where the uncertainty of the law is more burdensome than injustice. Even if prescription seems to lead in some rare cases to results contrary to equity . . . it can easily be forgiven in exchange for the great services it renders to society. Without it there would be no security in transactions, no stability in private estate, no peace among individuals, no order in the state."

Comment, 60 Tul L. Rev. at 380-81 n.13 and n.14 (quoting G. Baudry-Lacantinerie & A. Tissier, Traite Theorique et Pratique Du Droit Civil n.29 (4th ed. La. State L. Inst. trns. 1972)).

The Louisiana legislature enacted 9:5605, and a number of other prescriptive statutes pertaining to various professions, such as for accountant malpractice (L.A.-R.S. 9:5604) and medical malpractice (L.A.-R.S. 9:5628) all of which similarly provide that prescription commences to run on the date of discovery of the malpractice, as well as having three year peremptive periods. The legislative intent behind the medical malpractice prescription statute has been recognized as being for the general benefit of the public in keeping insurance costs down *Whitnell v. Menville*, 525 So.2d 361, rev'd on other grounds, 540 So.2d 304 (La. App. 4th Cir. 1988). Likewise, legislative records indicate that similar concerns exist with respect to actions for accountant and attorney malpractice actions. (App. E).

The legislature's efforts to prevent staleness of actions, to lend finality to a defendant's liability exposure

and to keep concomitant insurance costs down all provide a reasonable basis for any disparity in treatment, however slight it may be, between the victims of attorney malpractice and those of lay tortfeasors. As such, petitioner has not presented an equal protection challenge worth review by this court.

B. Due Process

Petitioner also challenges L.A.-R.S. 9:5605 on due process grounds.

The only "vested" right which petitioner has is the one which was created by the 1990 enactment of L.A.-R.S. 9:5605. Petitioner was in no way deprived of this right. Petitioner argues that the commencement of prescription prior to manifestation of damage constitutes a denial of due process. However, the mere fact that L.A.-R.S. 9:5605 provides that prescription begins to run on a cause of action from the date of the act, even if damages have not been sustained, does not amount to a due process violation.

The law making body is the primary judge as to what is a reasonable time limitation for bringing of actions and courts will not inquire into the wisdom of legislative decisions establishing a period of limitation unless the time allowed is so manifestly insufficient as to amount to a denial of justice. *Caldwell v. Alabama Dry Dock and Shipbuilding Co.*, 161 F.2d 83 (5th Cir. 1947), certiorari denied, 68 S.Ct. 59, 60, 332 U.S. 759, 92 L.Ed. 345. Furthermore, and as previously stated, statutes of limitations serve an important function in preventing staleness of claims and have great social utility in promoting stability

of transactions and peace among citizens. It is well established that the imposition of a reasonable time period in which to exercise rights to file suit does not violate due process.

Petitioner also argues that the 1992 amendments to L.A.-R.S. 9:5605, adding paragraph (B), simultaneously created a vested right in Alligator Farms by eliminating the requirement that a malpractice plaintiff sustained damage before cause of action accrues, and then eliminating that right through the operation of the one year prescriptive period. (Pet. pg. 25).

This suggests that petitioner knew of the act complained of prior to September 7, 1990, but assumed non-retroactivity of L.A.-R.S. 9:5605. It further suggests that, by the time that the legislature informed petitioner that the statute would be retroactively applied, the three year peremptive period had run.

The facts do not support this argument. The court's finding was that the petitioner was, or should have been, aware of the wrongful act on July 11th, 1991. (App. C and D). Therefore, the act did not occur prior to September 7, 1990. Since the act did not occur prior to September 7, 1990, the 1992 amendments, adding paragraph (B) to L.A.-R.S. 9:5605, had absolutely no effect on petitioner's cause of action, either in the positive or negative. Simply put, according to the court's factual findings, L.A.-R.S. 9:5605 was already in effect at the time that petitioner's cause of action accrued. The 1992 amendments therefore did not create petitioner's cause of action. That was created in 1990. Furthermore, the 1992 amendments did not

operate to retroactively deprive petitioner of his cause of action.

In the event that petitioner contends that the portion of the 1992 amendments which explicitly state that the three year period its peremptive, rather than prescriptive, operated to deprive him of a right, again petitioner is inaccurate. The three year period did not come into play at all in this case because it had not run at the time that suit was filed.[2] Therefore, petitioner was "deprived" of no right, and certainly, in all events, was not deprived unfairly.

III. Conclusion

In conclusion, respondents object to the jurisdiction of this court over this matter on a writ of certiorari. The constitutional issues have not been properly raised before Louisiana Courts and those courts have not been given the opportunity to review the constitutionality of the statute currently being challenged. As such, there is no issue properly reviewable by this court on a writ of certiorari. For this reason the Petition for Writ of Certiorari should be denied.

Moreover, there are no constitutional issues being urged which are worthy of this court's review. L.A.-R.S.

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[2] Furthermore, this court has indicated that the type of "window" provided in paragraph (B) which gives a litigant ample opportunity to file suit on a cause of action that would otherwise be deemed prescribed meets due process requirements. *Wheeler v. Jackson*, 11 S.Ct. 76, 137 U.S. 245, 34 L.Ed. 659 (1890); *Saranac Land etc. v. Comptroller*, 20 S.Ct. 642, 177 U.S. 318, 44 L.Ed. 786 (1900).

9:5605 does not operate to deprive legal malpractice victims of equal protection of the laws in providing for the commencement of prescription on discovery of the act complained of. There is no discrimination, as all causes of action, for all torts, are deemed to be prescribed one year following the plaintiff's discovery of his cause of action. In any event, the Louisiana legislature has a reasonable basis upon which to base its classification.

Nor is there any merit in a due process challenge as the plaintiff in this cases was not unfairly deprived of a cause of action.

Respondents therefore respectfully urge this Court to deny the Petition for Writ of Certiorari.

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Attorneys for David W. Groner & David Groner & Assoc., A P.L.C.

APPENDICES

APPENDIX A – DENIAL OF RECONSIDERATION OF WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT DATED NOVEMBER 27, 1995

THE SUPREME COURT OF THE STATE OF LOUISIANA

NO. 95-C-1670

RAYMOND JOHN O'BRIEN, III

VERSUS

DAVID W. GRONER

C/W

ALLIGATOR FARMS, INC., ET AL

VERSUS

DAVID GRONER, ET AL

IN RE: Alligator Farms, Inc.; Plaintiff(s); Applying for Reconsideration of this Court's action dated October 27, 1995; Parish of Iberia, 16th Judicial District Court, Div. "A" Number 0781443; to the Court of Appeal, Third Circuit, Number CA94-1611, CA94-1612

November 27, 1995

Reconsideration denied. Judgment is res judicata.

CDK
PFC
WFM
JCW
HTL
BJJ
JPV

Supreme Court of Louisiana
November 27, 1995

s/illegible
Clerk of Court
For the Court

APPENDIX B – DENIAL OF WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT DATED OCTOBER 27, 1995

THE SUPREME COURT OF THE STATE OF LOUISIANA

NO. 95-C-1670

RAYMOND JOHN O'BRIEN, III

VERSUS

DAVID W. GRONER

C/W

ALLIGATOR FARMS, INC., ET AL

VERSUS

DAVID GRONER, ET AL

IN RE: Alligator Farms, Inc.; Plaintiff(s); Applying for Writ of Certiorari and/or Review; Parish of Iberia, 16th Judicial District Court Div. "A" Number 078081, 178143; to the Court of Appeal, Third Circuit, Number CA94-1611, CA94-1612

October 27, 1995

Denied.

BJJ
PFC
WFM
JCW

LEMMON, J. would grant the writ.
KIMBALL, J. would grant the writ.
VICTORY, J. would grant the writ.

Supreme Court of Louisiana
October 27, 1995

s/illegible
Clerk of Court
For the Court

APPENDIX C - DECISION OF THE LOUISIANA THIRD CIRCUIT COURT OF APPEAL DENIED MAY 31, 1995

NOT FOR PUBLICATION

NUMBER 94-1611

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

RAYMOND JOHN O'BRIEN, III

Plaintiff-Appellant

VERSUS

DAVID W. GRONER

Defendant-Appellee

CONSOLIDATED WITH NUMBER 94-1612

ALLIGATOR FARMS, INC., ET AL

Plaintiffs-Appellants

VERSUS

DAVID GRONER, ET AL

Defendants-Appellees

On Appeal from the Sixteenth Judicial District for the Parish of Iberia, State of Louisiana; Honorable C. Thomas Bienvenu, Jr., Judge, Presiding.

BEFORE: LABORDE, WOODARD and AMY, Judges.

LABORDE, Judge.

Plaintiffs filed suit against defendant for legal malpractice. Defendant then filed an exception of prescription, which the trial court granted, dismissing plaintiffs' action. Plaintiffs appeal. We affirm, finding no error in the trial court's judgment.

FACTS

Plaintiff, Raymond John O'Brien, was the owner of Alligator Farms, Inc., a corporation he formed in 1989. Defendant, David Groner, an attorney was hired by the corporation to assist in preparing a financial package and business proposal for potential investors and lending institutions. Groner agreed to accept a percentage of the company's profits instead of monetary payment for his services. In the agreement in which Groner became a shareholder, dated November 11, 1990, the parties listed Groner's responsibilities as follows:

> Responsibility for obtaining all capital necessary to finance the operations of Alligator Farms, Inc., including meeting all operating expenses, and financing for capital improvements necessary to fully develop the operations of Alligator Farms, Inc. which are outlined in Exhibit "1", however reasonable time is allowed for the finances to be obtained.

Groner was then named as an officer and shareholder of the corporation, and he continued to represent the corporation for the purpose of obtaining financing. Groner approached First Production Credit Corporation for financing $1.5 million to Alligator Farms. However, during negotiations with First Production, Groner contacted Hibernia Bank in Lafayette to see if he could get more

favorable loan terms for the company. Hibernia apparently agreed to loan Alligator Farms the same amount, with more favorable terms than First Production, and informed Alligator Farms that it could made [sic] the funds available immediately. After Alligator Farms began negotiations with Hibernia, it informed First Production that it was no longer interested in obtaining a loan.

Hibernia began evaluating plaintiffs loan application, with O'Brien's assets as collateral. Hibernia advanced $100,000 to Alligator Farms while it was still investigating Alligator Farms' collateral. O'Brien then signed a collateral mortgage on his personal property to Hibernia for $1.5 million, to secure the financing from Hibernia. Hibernia subsequently advanced another $250,000 even though it had not completed a title opinion to O'Brien oil and gas properties. Soon afterwards, Hibernia informed Alligator Farms that funding would be suspended until the bank could obtain an independent evaluation of the properties.

O'Brien then asked one of his oil and gas attorneys, John Madison, to write a letter to Hibernia in support of his loan. On July 5, 1991, Madison wrote a letter to Hibernia outlining O'Brien's understanding of the status of the loan. By letter dated July 11, 1991, Harold Turner of Hibernia responded that Hibernia had not made a verbal or written commitment to O'Brien or Alligator Farms for any amount. He further stated that Hibernia had advanced funds to be company based only on O'Brien's personal income and would not be advancing additional funds until completion of the evaluation of his oil and gas properties. A copy of this letter was also sent to O'Brien.

However, after this letter was sent, Hibernia did advance Alligator Farms another $50,000, for a total of $400,000.

The appraisal concluded that O'Brien's properties were insufficient to support the loan. Hibernia subsequently refused to advance Alligator Farms any more funds. Because of this failure of Hibernia to loan the money Alligator Farms believed was promised, Alligator Farms was unable to meet its other commitments. Both O'Brien and Alligator Farms were forced to file for bankruptcy protection.

In August 1991, during bankruptcy proceedings, plaintiffs discovered that there was no written commitment from Hibernia to make a loan for $1.5 million. Yet Groner had represented to plaintiffs that a written loan commitment did exist, obligating Hibernia to loan the entire $1.5 million. In November of 1992, the bankruptcy judge concluded that plaintiffs had no cause of action against Hibernia because they had no written loan commitment. Plaintiffs claim they did not know there was no legal basis for a cause of action against Hibernia until the bankruptcy judge dismissed their claim.

Suit was filed by Raymond John O'Brien against David Groner on July 21, 1993. Another suit was filed against Groner on August 3, 1993, by the trustee in bankruptcy for Alligator Farms. Defendant subsequently filed a peremptory exception of prescription on December 8, 1993. Hearing on the exception was held on July 3, 1994. At that time, the trial judge granted defendant's motion to consolidate the two cases. The trial court granted

defendant's exception of prescription, dismissing plaintiffs claims against Groner. Plaintiff O'Brien appeals, alleging three assignments of error:

> 1. The trial judge erred in finding that Raymond John O'Brien, III had notice which caused prescription to run against his cause of action more than one year before filing his Petition for Damages.
>
> 2. The trial judge erred in finding that Raymond John O'Brien, III has sustained damages more than one year before filing his Petition for Damages.
>
> 3. The trial judge erred in dismissing the petition of Raymond John O'Brien, III in its entirety, as Raymond John O'Brien III alleged several causes of action, i.e., failure of Groner to obtain a written commitment from the lender, failure to obtain an independent evaluation of O'Brien's oil and gas properties, and representing both the corporation and O'Brien individually, to the detriment of O'Brien.

Alligator Farms also appeals, alleging two assignments of error:

> 1. The trial judge erred in finding that Alligator Farms, Inc. had notice which caused prescription to run against its cause of action more than one year before filing its Petition for Damages.
>
> 2. The trial judge erred in finding that Alligator Farms, Inc. had sustained damages more than one year before filing its Petition for Damages.

PRESCRIPTION

The trial court found that plaintiffs action had prescribed. In his reasons for judgment, the trial court stated as follows:

> The statute that is controlling for purposes of these exceptions is Section 5605 of Title 9 of the Revised Statutes. And for our purposes here, we are talking about a cause of action for legal malpractice and an exception of prescription to that cause of action based on the one-year prescriptive period provided by Paragraph "A" of the section that I just mentioned. And regardless of the doctrine of contra non valentem, the statute is clear that there is a one-year prescriptive period, either requiring that the suit be brought within one year from the date of the alleged act or within one year form [sic] the date that the alleged act is discovered or should have been discovered by the plaintiffs.
>
> The alleged act, as I – as I understand, regardless of whether – of when the damages may have been actually sustained, was the act of Mr. Groner in not obtaining a written commitment for a $1.2 million loan that he had secured; in other words, that he had received a commitment for that amount but had not taken the appropriate legal step to get it in writing, which he should have prudently done as an attorney. That's the cause of action, I understand, against him. That's the – the act complained of. And the question is: when should that act or omission have been discovered by the plaintiffs?
>
> Well, it seems to me that, regardless of what may have happened before, the Hibernia National Bank, in response – by letter of July

5th, 1991, in response to Mr. Madison's letter to them of July – I'm sorry – their letter of July 11th, 1991, which is Defendant's Exhibit Number 4, in response to Mr. Madison's letter to the bank of July 5th, 1991, Defendant's Exhibit Number 3, makes it clear that it's the bank's position that they did not at that time and up to that time make either a verbal or written commitment to the plaintiffs for any amount. Now, Defendant's Exhibit Number 4 was copied to Mr. O'Brien, and there seems to be no question but that the plaintiffs were aware of this letter.

I don't see any evidence of anything happening after that that should have caused the plaintiffs to reasonably believe that the bank had made a commitment to them, a firm commitment to them for – for any amount, except what they later loaned, $50,000.00, and certainly not in the amount of $1.2 million. If the bank made no commitment, either verbally or in writing, it should not have come as a surprise in August of '92 to find that out upon examination of the bank's documents; and it should not have been a surprise in November of 1992 when the bankruptcy judge announced that he could not give any more credence to the plaintiff's claim against Hibernia because there was not in existence a written letter of commitment. I don't see what could have happened between July 5th, 1991 – July 11th, 1991 and November of 1992 to make the plaintiffs reasonably believe that the desired commitment was thee [sic], either verbally or in writing. I don't doubt that Mr. O'Brien believed it, but it becomes a question under the statute of reasonableness. Should he have believed it? I think then that sufficient time elapsed for the filing of the action, which is one

> year from the date of the act or when the plaintiffs should have discovered the act. It would seek [sic] to me that the exceptions of prescription should be sustained.

We agree with the trial court's conclusions. Under La. R.S. 9:5605, prescription runs from the time of the act or omission, not from the time of the injury. Succession of Hellmers, 93-2386, 93-2387, 93-1883, 93-2073 (La. App. 4 Cir. 5/26/94); 637 So.2d 1302. Thus, the trial court properly sustained the defendant's exception of prescription.

DECREE

The judgment of the trial court is affirmed. Costs assessed to plaintiffs-appellants, Raymond John O'Brien and Alligator Farms, Inc.

AFFIRMED.

APPENDIX D – JUDGMENT AND WRITTEN REASONS FOR JUDGMENT FROM THE SIXTEENTH JUDICIAL DISTRICT COURT, STATE OF LOUISIANA

16TH JUDICIAL DISTRICT COURT

DOCKET NUMBER: 78081-A

IBERIA PARISH, LOUISIANA

RAYMOND JOHN O'BRIEN

VERSUS

DAVID W. GRONER

CONSOLIDATED WITH

16TH JUDICIAL DISTRICT COURT

DOCKET NUMBER: 78143-A

IBERIA PARISH, LOUISIANA

ALLIGATOR FARMS, INC. and
RAYMOND JOHN O'BRIEN, III

VERSUS

DAVID GRONER and
DAVID GRONER & ASSOCIATES, A P.L.C.

JUDGMENT

This matter came for hearing before this Honorable Court on June 3, 1994 on an Exception of Prescription filed by defendants, DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C.;

Present at the hearing were:

1) Leon J. Minvielle, III, counsel for RAYMOND JOHN O'BRIEN;

2) Milo A. Nickel, Jr., counsel for ALLIGATOR FARMS, INC. and RAYMOND JOHN O'BRIEN, III; and

3) William M. Bass, counsel for DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C.

After considering the law, evidence, memorandum and arguments of counsel, together with the pleadings, testimony, and depositions it is the Court's Judgment that:

The Exception of Prescription filed on behalf of DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C. is hereby sustained with Judgment rendered in favor of DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C. and against plaintiffs, RAYMOND JOHN O'BRIEN, III and ALLIGATOR FARMS, INC., with the costs of this matter to be shared by plaintiffs, RAYMOND JOHN O'BRIEN, III and ALLIGATOR FARMS, INC.

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C. and against RAYMOND JOHN O'BRIEN, III and ALLIGATOR FARMS, INC., dismissing plaintiffs' demands against DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C., with prejudice at plaintiffs' costs.

JUDGMENT RENDERED, READ AND SIGNED on this 25th day of August, 1994 at New Iberia, Louisiana.

s/C. Thomas Bienvienu, Jr.
HONORABLE C. THOMAS BIENVIENU, JR.
16th Judicial District Judge

[73] REASONS FOR RULING

BY THE COURT:

Okay. The statute that is controlling for purposes of these exceptions if Section 5605 of Title 9 of the Revised Statutes. And for our purposes here, we are talking about a cause of action for legal malpractice and an exception of prescription to that cause of action based on the one-year prescriptive period provided by Paragraph "A" of the section that I just mentioned. And regardless of the doctrine of contra non valentem, the statute is clear that there is a one-year prescriptive period, either requiring that the suit be brought within one year from the date of the the [sic] alleged act or within one year from the date that the alleged act is discovered or should have been discovered by the plaintiffs.

The alleged act, as I – as I understand, regardless of whether – of when the damages may have been actually sustained, was the act of Mr. Groner in not obtaining a written commitment for a $1.2 million loan that he had secured; in other words, that he had received a commitment for that amount but had not taken the appropriate legal step to get it in writing, which he should have prudently done as an attorney. That's the cause of action,

I understand, against him. That's the – the act complained of. And the question is: when should that act or omission have been discovered by the plaintiffs?

[74] Well, it seems to me that, regardless of what may have happened before, the Hibernia National Bank, in response – by letter of July 5th, 1991, in response to Mr. Madison's letter to them of July – I'm sorry – their letter of July 11th, 1991, which is Defendant's Exhibit Number 4, in response to Mr. Madison's letter to the bank of July 5th, 1991, Defendant's Exhibit Number 3, makes it clear that it's the bank's position that they did not at that time and up to that time make either a verbal or written commitment to the plaintiffs for any amount. Now, Defendant's Exhibit Number 4 was copied to Mr. O'Brien, and there seems to be no question but that the plaintiffs were aware of this letter.

I don't see any evidence of anything happening after that that should have caused the plaintiffs to reasonably believe that the bank had made a commitment to them, a firm commitment to them for – for any amount, except what they later loaned, $50,000.00, and certainly not in the amount of $1.2 million. If the bank made no commitment, either verbally or in writing, it should not have come as a surprise in August of '92 to find that out upon examination of the bank's documents; and it should not have been a surprise in November of 1992 when the bankruptcy judge announced that he could not give any more credence to the plaintiff's claim against Hibernia because there was not in existence a written letter of commitment. I don't see what could have happened between July 5th, 1991 – July 11th, 1991 and November of 1992 to make the plaintiffs reasonably believe that the

desired commitment was thee [sic], either verbally or in writing. I don't doubt that Mr. O'Brien believed it, but it becomes a question under the statute of reasonableness. Should he have believed it? I think then that sufficient time elapsed for the filing of the action, which is one year from the date of the act or when the plaintiffs should have discovered the act. It would seek [sic] to me that the exceptions of prescription should be sustained.

BY MR. NICKEL:

May I add one point for the record, your Honor?

BY THE COURT:

Yes sir.

BY MR. NICKEL:

For the record, the cases that are cited by both Mr. Minvielle and myself in the briefs state that a plaintiff cannot maintain a cause of action and in fact a cause of action is premature until an ascertainable damage has been suffered with certainty.

Now, our position in this case is that Mr. O'Brien's damage was the loss of his cause of action against Hibernia, which occurred in November when the court did rule.

We – there's no dispute that Hibernia wrote a letter that said, "It's our position there's no commitment." There's also no dispute as between the parties that both sides believed that prior to that letter they had a written commitment. And [76] had they had one, they would have had a valid cause of action against Mr. O'Brien.

Mr. O'Brien could not have sued – had no reason – neither party had a reason to sue Hibernia after those letters were written because, as Mr. O'Brien has testified, they did fund additional money after those letters; there was no damage.

The issue becomes: when can he file suit? Even with discovery, even with the act, a cause of action does not exist without damages. The position of all parties in this case – of both plaintiffs is: there was no damage until Mr. O'Brien lost his cause of action against Hibernia Bank. And that occurred in November of 1992.

BY THE COURT:

Well, I don't know. I can let Mr. Bass respond if he wants. You want?

BY MR. BASS:

Your Honor, those comments by counsel were not appropriate. I think the Act is very clear with respect to what the prescriptive period is. And I think it's sufficient, and I think we've met that – met those requirements.

BY MR. NICKEL:

I'm not trying to mislead the Court or counsel about what the Act states, Your Honor. We cited cases that said that a cause of action does not accure until there is an [sic] ascertainable damages that has been caused with sufficient certainty by a given source. And our position is that, before the parties could sue Mr. Groner or before the [77] cause of action even came into existence, there had to e [sic] damages which were suffered with certainty as a result of Mr. Groner's conduct. And that's – we believe the evidence here indicates that that damage occurred

when there was an adverse ruling within the bankruptcy proceedings.

BY THE COURT:

Well, I don't think that's so. That's – that's simply when the bankruptcy judge made his ruling. But, to me, it should have been obvious beforehand that the basis for the ruling was there. And I don't think that's when the damages were sustained. That may have been when they became formalized or it became crystal clear or – or it was the date apparently of the dismissal of the action that the plaintiffs had against Hibernia. But I don't – I don't arrive at that same conclusion. But, to the extent that – that you need to protect the record, it's on the record.

Now, you know, appellate courts are very liberal on the question. So it may be y'all may succeed in taking it up. And certainly don't have any hesitation to, if you want to. You're not going to make me feel bad. If they feel differently, that's fine. The claim's not against me.

At any rate, if there's – one of y'all prepare a judgment. I guess – you've got two lawsuits here. Well, they're consolidated.

[78] BY MR. MINVIELLE:

They're consolidated now.

BY THE COURT:

So I guess you'll want to prepare it.

BY MR. BASS:

Yes, sir.

BY THE COURT:

Send it to counsel for approval as to form, or at least give them an opportunity to object to the form.

BY MR. BASS:

Thank you, Your Honor.

APPENDIX E – SENATE COMMITTEE ON JUDICIARY A, MINUTES OF MEETING OF JUNE 26, 1990

Chairman Bagneris called the meeting to order at 10:30 a.m., on Tuesday, June 26, 1990, in Senate Committee Room E of the State Capitol in Baton Rouge.

The secretary called the roll, and the following members were present:

Senator Bagneris, Chairman
Senator Foster, Vice Chairman
Senator Bares
Senator Fields
Senator Heinkel
Senator Nelson
Senator Swearingen

The following staff were present:

Jean L. Clyburn, Committee Attorney
Tom Tyler, Committee Professional
Lynda Middleton, Committee Secretary

The following witnesses were present:

Lucy McGough, Children's Code Project Committee, LSU Law School
Johnny Koch, Louisiana Dental Association
Carl Darbler, Louisiana Trial Lawyers Association
Katheryn Spaht, Louisiana State Law Institute
Catherine Smith, Independence, Louisiana
Larry Murrary, Louisiana Bankers Association
Mary Beth Arceneaux, Louisiana Bankers Association
Dr. David Smith, The Blood Center for Southeast Louisiana

Dr. Ralph Meier, The Blood Center for Southeast Louisiana
Harold Thomas, attorney, New Orleans, Louisiana

Senator Fields moved that the minutes for June 5, 1990, be adopted, and there being no opposition, the minutes were adopted.

House Bill 1338 by Representative Theriot

Senator Bagneris stated that he had been requested to handle this bill by Representative Theriot. He stated that this bill provides a one-year prescriptive period within which to file a malpractice action either against an accountant arising out of professional accounting services or against an attorney arising out of legal services, whether based in tort or breach of contract. One year is calculated from the date that the alleged act, omission, or neglect is discovered or should have been discovered, but the action must be brought no later than three years from the date of such occurrence. The action must not only be filed within this period, but it must be filed in a court of proper jurisdiction and venue. This prescription runs against all persons, including minors and interdicts. Because Louisiana is one of two states in the union to have a ten year prescriptive period, liability insurance is cost prohibitive. Carl Barbier of the Louisiana Trial Layers Association stated that he was not opposed to the bill as a whole, but would like an amendment to state that in the case of fraud, the peremptive period would not apply. Senator Bagneris offered an amendment to state this, and there being no opposition, the amendment was adopted. Senator Heinkel moved that the bill be

reported favorably as amended, and there being no opposition, the bill was so reported.